87-1752

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GERDA DOROTHEA DEWEERTH,

Petitioner,

vs.

EDITH MARKS BALDINGER and
WILDENSTEIN & CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In a diversity case, the Second Circuit refused to certify to the New York Court of Appeals the question whether a New York statute of limitations applicable to the recovery of stolen property, which begins to run only after the owner's demand for the return of the property is refused, requires the owner to be diligent in attempting to locate the property, and, rejecting the district court's finding of fact that the owner had been diligent, held as a matter of law that she was not. The questions presented are:

I. When other federal courts of appeals characterize the issue of diligence as a question of fact, may a court of appeals reject a finding of fact by a district judge that the petitioner was diligent in her efforts to locate a painting stolen from her, in disregard of the federal rule that such finding shall not be set aside unless clearly erroneous, and characterize the issue as a question of law and hold that petitioner was not diligent?

II. May a federal court of appeals, in a diversity case in which a dispositive and unresolved question of state law is identified by that court, (a) refuse to certify the question to the state's highest court pursuant to a state procedure adopted to answer such questions on the mistaken assumption that the question will not recur frequently, and (b) itself devise a dispositive rule of state law not contemplated by state precedents and in conflict with a prior decision of that federal court?

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The petitioner, Gerda Dorothea DeWeerth, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on December 30, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 836 F.2d 103, and is reprinted in appendix A hereto, p. A-1, *infra*. The decision of the United States District Court for the Southern District of New York (Broderick, J.) is reported at 658 F.Supp. 688, and is reprinted as appendix C hereto, p. A-26, *infra*.

JURISDICTION

The petitioner brought this suit in the United States District Court for the Southern District of New York; jurisdiction was founded on the diverse citizenship of the parties under 28 U.S.C. §1332(a)(2) (1982). On April 28, 1987, the District Court filed an opinion and order granting petitioner's claim. (A-26).[1] On respondents' appeals, the Second Circuit, on December 30, 1987, entered an opinion and judgment reversing the District Court. (A-1, A-24). A petition for rehearing with a suggestion for rehearing in banc was denied by the Second Circuit on February 5, 1988. (A-47). The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1254(1) (1982).

STATUTES AND RULES INVOLVED

The Rules of Decision Act, 28 U.S.C. §1652 (1982), provides as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Section 214 of the New York Civil Practice Law & Rules (McKinney 1972) provides in pertinent part as follows:

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[1] References to pages of the appendix are in the form "(A-)."

> The following actions must be commenced within three years:
>
> ....
>
> 3. an action to recover a chattel or damages for the taking or detaining of a chattel; ....

Rule 500.17 of the Rules of the New York Court of Appeals (McKinney 1988) provides in pertinent part as follows:

> (a) Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before it for which there is no controlling precedent of the Court of Appeals, such court may certify the dispositive questions of law to the Court of Appeals.

STATEMENT OF THE CASE

A. Proceedings in the District Court

DeWeerth, a citizen of West Germany, filed this diversity action for the recovery from respondent Baldinger of a painting by Claude Monet. A bench trial was had before District Judge Vincent L. Broderick at which videotaped depositions of DeWeerth and other witnesses, and the documentary evidence, were submitted. The judge found the following facts.

1. *The Findings of Fact*

Petitioner inherited the Monet in 1922, and kept the painting in her residence in Wuppertal-Elberfeld, West Germany. In August, 1943, at the height of World War II, DeWeerth sent the Monet to her sister in southern Germany for safekeeping. The painting was stored in her sister's house. In the fall of 1945, with the departure of American troops quartered in the house, the Monet disappeared. The district judge inferred that the painting was stolen at that time.

DeWeerth, a middle-aged woman alone in bombed-out Germany, made attempts to locate the painting that the district judge found to be reasonably diligent after observing DeWeerth and listening to her testimony. In 1946, after the war, she filed a report of the theft with the military government administering the Bonn-Cologne area. In 1948, she solicited the assistance of her lawyer to find the painting. In 1955, she sent a photograph of the painting to an art expert and asked him to investigate the painting's whereabouts. In 1957, she reported the Monet as missing to the West German Federal Bureau of Investigation. Her efforts were unsuccessful.

In December, 1956, respondent Wildenstein & Co., Inc., an art gallery in New York City, acquired the Monet from a dealer in Geneva, Switzerland, without investigation of his title. Six months later Wildenstein sold the Monet to respondent Baldinger, a bona fide purchaser. Baldinger has kept the Monet in her apartment in New York City to this date.

In 1981, DeWeerth learned that the painting was depicted in a catalogue of Monet's works, printed in Paris in 1974 by the Wildenstein Foundation. The catalogue stated that Wildenstein had sold the Monet in 1957, and that the painting had been exhibited by Wildenstein in 1970, but did not identify the possessor. The catalogue gave a provenance for the Monet that falsely omitted Wildenstein's direct source for the painting.

In November, 1982, DeWeerth sued Wildenstein in a special proceeding in New York Supreme Court to compel identification of the possessor. The New York court ordered Wildenstein to do so in December, 1982, and Wildenstein identified Baldinger. By letter dated December 27, 1982, DeWeerth demanded return of the Monet from Baldinger. Baldinger refused on February 1, 1983, and this action followed within the month.

2. *The "Elicofon" Case.*

Shortly before the commencement of this action, the Second Circuit decided *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), *aff'g*, 536 F. Supp. 829 (E.D.N.Y. 1981), holding that an East German museum was entitled to recover paintings stolen in 1945 and discovered in 1966 in the possession of a bona fide purchaser in New York. In accordance with New York case law, *Menzel v. List*, 22 A.D. 2d 647, 253 N.Y.S. 2d 43 (1st Dept. 1964), *Elicofon* held that the three-year New York statute of limitations applicable to an action for the recovery of property in the hands of a bona fide purchaser does not begin to run until demand is made for the return of the property and the demand is refused, subject to the condition that the plaintiff may not unreasonably delay making the demand after locating the stolen property. *Elicofon*, 536 F. Supp. at 848-49.

As the *Elicofon* plaintiff was found to have been diligent throughout the period following the theft, the district court in *Elicofon* declined to rule on a question never decided by a New York state court: whether, *prior* to locating the possessor, the plaintiff had a duty of diligence under the statute of limitations (*viz.*, apart from the doctrine of laches). *Id.* at 849-50. On the appeal in *Elicofon* the defendant-possessor contended against the application of the New York rule that "a bona fide purchaser must wait, possibly indefinitely, for a demand from the owner." *Elicofon*, 678 F.2d at 1163. The Second Circuit accepted that this was indeed the case:

> [W]e are charged only with applying New York law, not with remaking or improving it. As between the policy, urged by Elicofon, of allowing the statute of limitations to run against an owner regardless of his ignorance, and tolling it *indefinitely* against a good faith purchaser until a demand is made, *we are satisfied that New York has chosen the latter course.*

Id. at 1163-64 (Mansfield, C.J.) (emphasis supplied). The Second Circuit rejected the suggestion that New York had a reasonable inquiry rule. *Id.* at 1164, n. 25.

3. *The Decision of the District Court.*

Judge Broderick held that DeWeerth was the owner of the painting and ordered Baldinger to return it. In light of *Elicofon*, the judge decided that DeWeerth's claim was not barred by the New York statute of limitations because the three-year limitations period did not begin to run until February, 1983, when DeWeerth's demand was refused; the action was filed in that month.

In relation to the requirement of the statute of limitations that the plaintiff not unreasonably delay the demand, Judge Broderick found, on the basis of DeWeerth's efforts to locate the painting (p. 4, *supra*): "I find that plaintiff [DeWeerth] did not unreasonably delay her demand for the return of the Monet, and her action is not barred on timeliness grounds."(A-35). The judge found that she had been diligent throughout the period following the theft. (A-35). In relation to the defense that DeWeerth was guilty of laches, Judge Broderick noted, "[e]ven if plaintiff had unreasonably delayed her demand, defendant cannot show that she was prejudiced by the delay." (A-44, n. 10).

B. **Proceedings in the Second Circuit.**

1. *New York Law on the Date of the Appeal.*

On the date of Baldinger's appeal to the Second Circuit the law of New York stood as follows:

> (a) The statute of limitations did not begin to run until demand was made to return the property and the demand was refused, but the owner was required not to delay unreasonably in making the demand if he was in a position to make it;
>
> (b) If the owner was indolent before locating the possessor *and* the possessor was prejudiced thereby, general equitable principles of laches might bar the claim.

2. *The Second Circuit Decision.*

On Baldinger's appeal, the Second Circuit reversed the judgment of the District Court. Contrary to its view of the statute of limitations in *Elicofon*, 678 F.2d 1163-64 that "we are charged only with applying New York law, not with remaking or improving it" (p. 5, *supra*), the court held:

> [W]e believe that the New York courts would impose a duty of reasonable diligence in attempting to locate stolen property, in addition to the undisputed duty to make a demand for return within a reasonable time after the current possessor is identified.

(A-12). That is, for the period prior to identification of the possessor, an obligation of diligence was added to the statute of limitations, detached from any requirement of prejudice associated with the doctrine of laches. This was new law. The Second Circuit declined to certify to the New York Court of Appeals the controlling and unresolved question whether the statute of limitations imposed such an obligation before identification of the possessor because it believed that the question would not arise frequently. (A-12, n. 5). (That the Second Circuit was mistaken about the incidence of the issue is made plain below (pp. 17-18, *infra*).)

Next, the Second Circuit rejected the district court's finding of fact that DeWeerth was reasonably diligent. The court reasoned that, because the new obligation of diligence was "legally" and not "equitably" rooted (i.e., the court had attached the obligation to the statute of limitations apart from equitable laches doctrine), the court could determine as a matter of law whether DeWeerth had been diligent in the period 1945-1982, unfettered by the constraints of the "clearly erroneous" rule applicable to findings of fact. Fed. R. Civ. P. Rule 52(a). (A-17). The panel then decided that, as a matter of law, DeWeerth had not been reasonably diligent in the pursuit of the painting in the period prior to the identification of Baldinger. (A-19-A-20). (The fallacy in the analysis is considered below (pp. 11-12, *infra*.))

DeWeerth's timely petition for rehearing and rehearing in banc was denied. (A-47). Among other points, the petition urged the Second Circuit to certify to the New York Court of Appeals the question whether, in relation to the statute of limitations, an owner must be diligent prior to locating stolen property.

REASONS FOR GRANTING THE WRIT

This case presents two questions of federal courts law that this Court has recognized as important. The Court has frequently reversed judgments of federal courts of appeals that disregarded the federal rule that findings of fact by a district court must not be set aside unless clearly erroneous. In this case the rule was plainly violated on the issue whether DeWeerth was diligent before 1982, an issue held to be factual by virtually all other courts of appeals.

Because the court of appeals rejected the district court's finding and treated the issue of diligence as a question of law, it became entangled needlessly in a question of state law that led to a second error of federal courts law: in a diversity case, the court manufactured an unprecedented and dispositive rule of state law — attaching a diligence requirement to a New York statute of limitations — without first certifying to the New York Court of Appeals the question whether such requirement should be imposed. Unlike exorbitant determinations of state law made by district courts, which can be corrected by the courts of appeals, when such a determination originates in a court of appeals the error must be corrected by this Court, by requiring the court of appeals to certify the question for decision by the concerned state supreme court. The Court has encouraged federal courts to certify difficult, controlling, and unresolved questions of state law to state supreme courts. New York and more than 35 other states have established procedures inviting the certification of such questions from federal courts. Because the decision below turned on such a question, this case presents the Court with an opportunity to clarify, on a principled basis, the standards applicable to such certifications by federal courts of appeals.

I.

The Rejection by the Second Circuit of the District Court's Finding of Fact that Petitioner Was Reasonably Diligent, in Favor of Its Own Opposite Determination, Improperly Made as a Matter of Law, Disregarded Rule 52(a) of the Federal Rules of Civil Procedure and Holdings of Other Courts of Appeals, and Warrants Review and Reversal by this Court under *Anderson v. City of Bessemer.*

Beginning with *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985) (White, J.), in which the Court, on certiorari, reversed the Fourth Circuit's disregard of a district court's finding of Title VII discrimination, the Court has made a series of decisions confirming that the circuit courts must strictly observe Rule 52(a): *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713 (1986) (Rehnquist, J.) (whether party is seaman exempt from Fair Labor Standards Act is question of fact; de novo review by court of appeals reversed); *Dennison Manufacturing Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986) (per curiam) (non-obviousness of patented invention is issue of fact; petition granted, judgment below vacated, case remanded for reconsideration under Rule 52(a)); *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 2781-82 (1986) (Brennan, J.) (whether redistricting resulted in vote dilution is issue of fact determinable in light of all circumstances; three-judge district court reversed in part and affirmed in part); *see also Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 2451 (1986) (Blackmun, J.) (interpreting *Anderson* as grounded in judicial efficiency and expertise of trial judges in local law and first-hand observation).

The decisions give effect to a 1985 amendment of Rule 52(a) designed to strengthen findings of fact by a district judge, irrespective of their evidentiary source in documents or testimony, in light of the public interest in "the legitimacy of the district courts in the eyes of litigants," the discouragement of "appellate retrial" of factual issues, and the needless reallocation of judicial authority. Fed.R.Civ.P. 52(a), advisory committee note.

This case is another instance of disregard by a federal court of appeals of a finding by an experienced district judge on a dominantly factual issue. Judge Broderick found as a fact that DeWeerth "did not unreasonably delay her demand for the return of the Monet."(A-35). That finding is directly pertinent to the New York statute of limitations, which does not begin to run until the plaintiff makes, and the defendant rejects, such a demand, if the plaintiff does not unreasonably delay making the demand. Judge Broderick also found that throughout the period after the theft DeWeerth was reasonably diligent. (A-35). The district judge found that "[e]ven if plaintiff had unreasonably delayed her demand, defendant cannot show that she was prejudiced by the delay,"(A-44, n. 10), a finding pertinent to the defense of laches, which requires a showing not only of delay but also of prejudice to the defendant. (A-43, n. 6). The point of the distinction was this: as the Second Circuit was to acknowledge, (A-11), New York courts had applied the "unreasonable delay" condition of the statute *only* to the period *after* the defendant was known; prior to the identification of the defendant, the unreasonable delay of the plaintiff was governed by the doctrine of laches.

On the appeal, the Second Circuit nevertheless imposed a new diligence requirement on the plaintiff during the period before identification of the possessor as an element of the statute of limitations. (A-12, A-16). Having created that rule *ex nihilo*, it addressed the District Court's finding that DeWeerth was duly diligent as follows:

> Plaintiff asserts that the determination of the District Court may be reversed only if clearly erroneous. She bases this assertion on her characterization of the decision below as an application of the equitable defense of laches. *See Esso International, Inc. v. S.S. Captain John*, 443 F.2d 1144, 1150 (5th Cir. 1971) (existence of laches is a question of fact subject to review under clearly erroneous standard); *DeSilvio v. Prudential Lines, Inc.*, 701 F.2d 13, 15 (2d Cir. 1983) (ruling on laches may be overturned only where trial court

> abused its discretion). Although Judge Broderick subsumed the laches issue into his discussion of the statute of limitations, 658 F.Supp. at 693 n. 7, the two issues are distinct. Laches is an equitable defense that requires a showing of delay and prejudice to the defendant, whereas the reasonably prompt demand principle involved in this case is a legal doctrine based exclusively on an unexcused lapse of time. *See Devens v. Gokey, supra*, 12 A.D.2d at 137, 209 N.Y.S.2d at 97. Where, as here, the issue is the application of a legal standard — "reasonable diligence" — to a set of facts, review is *de novo*. *See Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co.*, 748 F.2d 118, 122 & n. 3 (2d Cir. 1984) (whether plaintiff's failure to discover a fraud was reasonable is a question of law subject to plenary review);....

The error here is plain. The operation of Rule 52(a) does not depend on whether the fact found is historically an "equitable" matter or a "legal" matter, and a fact issue is not transformed into a question of law because it is traceable to the "law" side of the legal system; indeed, Rule 52(a) originated in federal equity practice but was adopted for all issues of fact. *See* Fed. R. Civ. P. 52(a), advisory committee note (rule "accords with the decisions on the scope of the review in modern federal equity practice").[2] The issue, rather, is whether the concept of diligence is factual in the usual sense in which courts distinguish factual from legal matters. So conceived, the issue of diligence is indubitably an issue dominated by factual elements, whether arising under Rule 52(a) or in summary judgment practice under Rule 56. Virtually every other circuit has so held (as have other panels of the Second Circuit), not only in relation to the highly pertinent issue of laches (under the cases cited by the Second

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[2] *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 56 U.S.L.W. 4243, 4247 (U.S. Mar. 22, 1988) (after merger of law and equity by Federal Rules of Civil Procedure, it is error to solve modern procedural problems with historical labels).

Circuit, pp. 10-11 *supra*) but in many other contexts as well.[3] Because factual issues are those "based on the fact-finding tribunal's experience with the mainsprings of human conduct," *Commissioner v. Duberstein*, 363 U.S. 278, 289 (1960); *accord Pullman-Standard v. Swint*, 456 U.S. 273, 288-89 (1982), the question whether any plaintiff, or DeWeerth in her particular circumstances, was duly diligent is surely answerable by a district judge based on such experience.

In terms of the *function* of Rule 52(a), *Anderson* underscores the inefficiency of what was done by the Second Circuit:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role

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[3] *Richards v. Mileski*, 662 F.2d 65, 71 (D.C. Cir. 1981) (diligence in discovering material facts for accrual of statute of limitations under Rule 52(a)); *Robertson v. Seidman & Seidman*, 609 F.2d 583, 592-593 (2d Cir. 1979) (diligence in discovering securities fraud under Rule 56); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1305 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971) (diligence in issuing press release under Rule 52(a)); *Bell Telephone Laboratories, Inc. v. Hughes Aircraft Company*, 564 F.2d 654, 656 (3d Cir. 1977), *cert. denied*, 435 U.S. 924 (1978) (diligence in reducing invention to practice under Rule 52(a)); *Potash Import Chemical Company v. M.S. Klaus Oldendorff*, 422 F.2d 818 (4th Cir. 1969), *cert. denied*, 400 U.S. 829 (1970) (diligence in making ship seaworthy under Rule 52(a)); *EEOC v. Exxon Shipping Co.*, 745 F.2d 967, 980 (5th Cir. 1984) (diligence in mitigating damages under Rule 52(a)); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) (diligence in discovering grounds for filing suit under Rule 56); *Dupuy v. Dupuy*, 551 F.2d 1005, 1023 (5th Cir. 1977) (diligence in discovering Rule 10b-5 fraud under Rule 52(a)); *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9-10 (5th Cir. 1967); *Monnich v. Kropp*, 408 F.2d 356, 357 (6th Cir. 1969) (diligence in executing parole violation warrant under Rule 52(a)); *Holdsworth v. Strong*, 545 F.2d 687, 692 (10th Cir. 1976), *cert. denied*, 480 U.S. 955 (1977) (diligence in discovering Rule 10b-5 fraud under Rule 52(a)); *Fireman's Fund Insurance Companies v. M/V Vignes*, 794 F.2d 1552, 1555 (11th Cir. 1986) (diligence in determining negligence of shipper); *Walters v. City of Atlanta*, 803 F.2d 1135, 1144 (11th Cir. 1986) (diligence in mitigating damages under Rule 52(a)).

> comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than 'tryout on the road.' "Wainwright v. Sykes, 433 U.S. 72, 90, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977). For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

Anderson, 470 U.S. at 874-75.

Here, as Judge Broderick's findings show, the trial was much concerned with the factual circumstances of DeWeerth's efforts to find the painting. The Second Circuit's reconsideration of Judge Broderick's finding on that issue was not only erroneous, it was wasteful.

Nor can the Second Circuit's determination of the issue of diligence as a question of law be condoned as the resolution of a mixed question of law and fact, as its citation to *Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co.*, 748 F.2d 118, 122 n. 3 (2d Cir. 1984) suggests. (A-17). A mixed question of law and fact may be resolved as a question of law, only when the rule of law to be applied is undisputed and the facts are historical events. *Pullman-Standard v. Swint*, 456 U.S. 273, at 289 n. 19 (1982) (when the "rule of law is undisputed," an issue may be regarded as a mixed question of law and fact and determinable as law if historical facts are established); *see Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 2781-82 (1986) (even when statutory standard must be applied to facts, Rule 52(a) applies if trial

court's "particular familiarity" with facts is relevant). A federal court may not in one stroke manufacture a rule of law, apply it to facts that involve state of mind and other subjective elements, and dispose of the question as a matter of law. *Azalea Meats, Inc. v. Muscat*, 368 F.2d 5, 10 (5th Cir. 1967) (reversing summary judgment: "[T]he factual issue of due diligence involves, to some extent at least, the state of mind of the person whose conduct is to be measured....").

The disregard of Rule 52(a) by the court of appeals calls for review, and reversal, by this Court.

II.

In a Diversity Case, the Refusal of the Second Circuit to Certify to the New York Court of Appeals a Controlling, Difficult, and Unresolved Question of New York Statutory Law Should Be Reviewed by this Court to Establish a Principled Basis on Which Such Questions May Be Certified by Federal Courts of Appeals to the More than 35 State Supreme Courts that have Adopted Certification Procedures.

The Second Circuit's rejection of Judge Broderick's finding that DeWeerth had been duly diligent, in favor of its holding that the issue was one of law, led to a wholly unnecessary revision of a New York statute of limitations by a federal court in a diversity case. The revision transformed the statute of limitations from a statute that begins to run when the owner is injured (by the possessor's refusal to return the property after demand) to a statute that begins to run when the owner fails to exercise diligence to discover the location of the property. In New York, such a revision of a statute of limitations requires legislation. *Thornton v. Roosevelt Hospital*, 47 N.Y. 2d 780, 782, 391 N.E. 2d 1002, 1003 (1979) (revision of injury statute to diligence standard "is best reserved for the Legislature, and not the courts"); D. Siegel, *New York Practice* §43 (Supp. 1987) (such revision is "momentous"); *cf.* N.Y. Civ. P. Law & R. §§213(8), 214-b, 214-c(2) (McKinney 1972 & Supp. 1988) (express diligence standards). But the attempt to enact such legislation was vetoed in

1986. Assembly Bill 11462-A was introduced to reverse, with respect to works of art purchased by museums, the rule of *Menzel v. List*, 22 A.D. 2d 647, 253 N.Y.S. 2d 43 (1st Dept. 1964), which starts the statute of limitations running only after the possessor's refusal of the owner's demand. The bill was vetoed by Governor Mario Cuomo in a message that stated in part:

> In establishing this new accrual date for these actions, the bill does not balance fairly the legitimate interests of foreign countries in recovering their lost or stolen art work, with the legitimate interests of museums or other good faith purchasers of art. It authorizes commencement of the statutory limitation period if the museum reports its acquisition of the art in certain periodicals, displays it for 12 months in a 36-month period, or catalogues it and makes the catalogue available to the public upon request. These provisions do not provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum's acquisition and take action to recover it before their rights are extinguished.
>
> I have been advised by the U.S. Department of State that the bill will result in New York becoming a haven for cultural property stolen abroad since such objects will be immune from recovery under the limited time periods established by the bill. The State Department also feels that the bill is objectionable from a foreign relations viewpoint. The U.S. Department of Justice and the U.S. Information Agency have raised similar concerns.

Governor's Message to the Assembly Returning, Without Approval, Assembly Bill No. 11462-A, July 26, 1986; *see* N.Y. Times, July 29, 1986, at C14, col. 3.

When such an exorbitant determination of state law is made by a federal *district* court sitting in a diversity case, the error can be corrected by the court of appeals. *See, e.g., Palace Entertainment, Inc. v. Bituminous Casualty Corp.* 793 F.2d 842, 843

(7th Cir. 1986) (reversing district court for instruction to jury erroneously stating Indiana law). But when such conduct *originates* in federal courts of appeals the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), will be undermined unless this Court either (a) directs that controlling, difficult, and unresolved questions of state law be certified by the circuits to the more than 35 state supreme courts that have invited such certifications, or (b) itself limits such ultra vires determinations as a federal matter.

In response to *Erie*, holding that the Rules of Decision Act, 28 U.S.C. §1652 (1982), obliges federal courts in non-federal matters to apply state decisional law to substantive issues, more than 35 states have adopted constitutional amendments, statutes, or rules of court authorizing the state's highest court to answer questions of state law certified to them by federal courts; the certification procedure was designed as a practical alternative to the abstention procedure. *See* Committee on Federal Courts, *Analysis of State Laws Providing for Certification by Federal Courts of Determinative State Issues Of Law*, 42 Rec. A.B. City N.Y. 101 (1987). Twenty-seven of those states, and the District of Columbia, have adopted the Uniform Certification of Questions of Law Act ("UCQLA"). 12 U.L.A. 49 (1975 & Supp. 1988).

Section 1 of the UCQLA authorizes a state supreme court to answer questions of law certified by any federal court if the federal case involves "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions . . . of this state." *Id.* at 52. New York amended its Constitution in 1985 to require the New York Court of Appeals to adopt a rule permitting that court to answer such questions. N.Y. Const. Art. 6, §3(b)(9) (McKinney 1987). The Court of Appeals has done so, inviting this Court, federal courts of appeals, and state courts of last resort to certify "determinative questions of New York law . . . for which there is no controlling precedent . . . ." N.Y. Rules of Court §500.17(a) (N.Y. Ct. App.) (McKinney 1988).

This Court has used, and has encouraged lower federal courts to use, such certification procedures to help "build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416 U.S. 386, 394 (1974) (certification procedures are "very desirable means by which a federal court may ascertain an undecided point of state law."); *accord Belotti v. Baird*, 428 U.S. 132, 150-51 (1976) (remanded with instruction to certify); *Elkins v. Mareno*, 435 U.S. 647, 662-63, n. 16 (1978) (Court certifies question to Maryland Court of Appeals); *Zant v. Stephens*, 456 U.S. 410, 416-17 (1982) (Court certifies question to Georgia Supreme Court); *Mills v. Rogers*, 457 U.S. 291, 306 (1982) (remanded to court of appeals to consider certification). Distinguished commentators support certification as an expression of federal-state cooperation. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 490 (1960); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317, 325 (1967).

The Second Circuit acknowledged that the question whether the New York statute of limitations included a diligence requirement would be certifiable but for the unlikelihood that the question would "recur with some frequency."(A-12, n. 5). Nothing whatever was submitted to the court by Baldinger and Wildenstein, the appellants below, on the incidence of such cases, and the court does not refer to any statistics in support. The court's suggestion is an uninformed and mistaken intuition; the international traffic in stolen works of art implies the contrary. *See* Bator, *The International Trade in Art*, 34 Stan. L. Rev. 275 (1982). As a distinguished art lawyer has written about the Second Circuit decision:

> Inasmuch as the [Second Circuit] was applying New York law — and not federal law — it had the right to require an opinion from the New York Court of Appeals as to what the New York law was. It refused to do so, however, on the ground that the question "is not likely to recur with some frequency." It is respectfully suggested that this conclusion is wrong. Art theft is one of the growing crimes in United States, perhaps

> the largest of the so-called victimless crimes. Every year, between one and two thousand stolen works of art are reported to IFAR [International Foundation for Art Research]. In its Art Theft Archive, there are over 28,000 stolen works collected in the past eleven years. The Statute of Limitations issue is a critical one in every case of recovering stolen art. If this decision is correct, it is possible that many art works of worth, concededly stolen, can never be recovered by the original owners. The test of reasonable diligence, the burden of which presumably would be on the victim, can be overpowering.

Feldman, *Court of Appeals Reverses DeWeerth Decision*, IFAR-reports Jan. 1988, at 4. It seems clear that federal and state courts in New York, the capital of the world art market, will be required to decide many of the cases that will arise out of these thefts of objects of constantly increasing value.[4]

Moreover, under the UCQLA and the New York rule, the state high courts do not regard the frequency of such cases as a proper criterion of certification: the question is certifiable if it is "determinative" and not subject to "controlling precedent." That is, the state supreme courts have invited the certification to them of determinative and unprecedented questions of state law even if infrequent.

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[4] There is currently pending in the United States District Court for the Southern District of New York a case by the Republic of Turkey for the recovery of stolen archeological artifacts where it has been argued that plaintiff unreasonably delayed making a demand. *Republic of Turkey v. Metropolitan Museum of Art*, 87 Civ. 3750 (S.D.N.Y.). The Guggenheim Museum filed suit in the New York courts in October, 1987, to recover a painting by Marc Chagall, stolen from the Museum in the 1960s, and discovered in 1985 to be in the possession of a bona fide purchaser in New York City. N.Y. Times, Sept. 26, 1987, at A14, col. 1. In 1984, the Attorney General of New York State brought a suit against Sotheby's gallery, claiming that Sotheby's had sold Hebrew books and manuscripts smuggled from a rabbinical seminary in Berlin that was destroyed by the Nazis in 1942. The suit was settled. N.Y. Times, Aug. 15, 1985, at C-15, col. 5. *See, generally*, Burnham, *As the Stakes in the Art World Rise, So Do Laws and Lawsuits*, N.Y. Times, Feb. 15, 1987, §2, at 1, col. 1.

To be sure, efficiency dictates that some discretion must reside in the federal courts to make necessary state law determinations that are implicit in, or reasonably foreshadowed by, state precedents. The risk of ultra vires determinations by *district* courts in such cases may be safely left to the supervision of the courts of appeals. Given the constitutional concerns of *Erie*, 304 U.S. at 78, however, this Court should hold that the discretion of the *circuits* must be exercised in favor of certification where (as here) the state law question is controlling, difficult, and unresolved by the state's legislature or highest court, the district court has not dealt with the issue, and there is no reason to suppose that the question is a rarity. The Court's renewed interest in "the twin policies of preserving the integrity of state law and respecting the institutional autonomy of state judicial systems" would be served by such a rule. *See* L. Tribe, *American Constitutional Law* §3-28 (2d ed. 1988).

CONCLUSION

The court of appeals forgot that it was an *appeals* court in a *federal* system. In rejecting the district court's finding that DeWeerth was reasonably diligent, it acted as a trial court. In making an ultra vires determination of New York law, it acted as a state legislature. We respectfully request that a writ of certiorari issue to the Second Circuit.

Dated: April 22, 1988

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 165, 296—August Term 1987

Argued: October 26, 1987 Decided: December 30, 1987

Docket Nos. 87-7392, 87-7402

GERDA DOROTHEA DEWEERTH,

Plaintiff-Appellee,

—v.—

EDITH MARKS BALDINGER,

Defendant-Third-Party-Plaintiff-Appellant,

—v.—

WILDENSTEIN & CO., INC.,

Third-Party-Defendant-Appellant.

Before:

FEINBERG, *Chief Judge*,
NEWMAN and WINTER, *Circuit Judges*.

Appeal from a judgment of the District Court for the Southern District of New York (Vincent L. Broderick, Judge) allowing plaintiff to recover an allegedly stolen painting from defendant, a good-faith purchaser. Defendant claims plaintiff failed to exercise due diligence in locating the painting.

Reversed.

LESLIE GORDON FAGEN, New York, N.Y. (Edward M. Sills, Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y., on the brief), *for defendant-third-party-plaintiff-appellant.*

JEREMY G. EPSTEIN, New York, N.Y. (Charles M. Lizza, Kenneth A. Freeling, Robert Y. Lewis, Shearman & Sterling, New York, N.Y., on the brief), *for third-party-defendant-appellant.*

JOSEPH D. BECKER, New York, N.Y. (Fox & Horan, Becker Glynn & Melamed, New York, N.Y., on the brief), *for plaintiff-appellee.*

JON O. NEWMAN, *Circuit Judge*:

This appeal concerns a dispute over ownership of a painting by Claude Monet that disappeared from Germany at the end of World War II and has been in the possession of a good-faith purchaser for the last 30 years. The appeal presents primarily the issue whether New York law, which governs this dispute, requires an individual claiming ownership of stolen personal property to use due diligence in trying to locate the property in order to postpone the running of the statute of limitations in a suit against a good-faith purchaser. The issue arises on an appeal from a judgment of the District Court for the Southern District of New York (Vincent L. Broderick, Judge) ruling that plaintiff-appellee Gerda Dorothea DeWeerth, a citizen of West Germany who owned the Monet from 1922 until 1943, was entitled to recover it from defendant-appellant Edith Marks Baldinger, an American citizen who purchased the painting in New York in 1957 and who has possessed it ever since. We conclude that New York law imposes a due diligence requirement, that the undisputed facts show that DeWeerth failed to exercise reasonable diligence in locating the painting after its disappearance, and that her action for recovery is untimely. We therefore reverse the judgment of the District Court.

Background

Claude Monet is, perhaps, the most well-known and widely admired member of the school of impressionist painters active in France in the late nineteenth and early twentieth centuries. It was his early work, "Impression: Sunrise, Le Havre" (1872) from which the term "impressionism" was coined. His later works, including the

depictions of haystacks, poplars, and the gardens at Giverny remain paragons of the impressionist style and reflect Monet's unsurpassed ability to capture on canvas the dazzling and magical play of light on the natural world.

The painting in the pending case, Monet's "Champs de Blé à Vétheuil," is one of a series of similar impressionistic landscapes painted by the artist near the town of Vétheuil, located on the Seine in Northern France. The oil painting, measuring 65 by 81 centimeters, shows a wheat field, a village, and trees. It is signed and dated "Claude Monet '79." The painting is estimated to be worth in excess of $500,000.

Plaintiff Gerda Dorothea DeWeerth is a citizen of West Germany. Her father, Karl von der Heydt, the owner of a substantial art collection, purchased the Monet in 1908. DeWeerth inherited the painting in 1922 along with other works of art from her father's estate. She kept the painting in her home in Wuppertal-Elberfeld, Germany, from 1922 until 1943, except for the two-year period 1927-1929 when the Monet was in the possession of her mother. A photograph taken in 1943 shows the Monet hanging on a wall in DeWeerth's residence.

In August 1943, DeWeerth sent the Monet and other valuables to the home of her sister, Gisela von Palm, for safekeeping during World War II. Von Palm lived in a castle in Oberbalzheim, Southern Germany. Von Palm received the shipment, including the Monet, which she hung in the castle. In 1945, at the end of the war, American soldiers were quartered in von Palm's residence. Following the soldiers' departure, von Palm no-

ticed that the Monet was missing. She informed her sister of the painting's disappearance in the fall of 1945.[1]

DeWeerth contacted several authorities concerning the lost Monet. In 1946, she filed a report with the military government administering the Bonn-Cologne area after the war. The report is no longer extant, but DeWeerth testified that it was a standard government form in which she briefly described items she had lost during the war. In 1948, in a letter to her lawyer, Dr. Heinz Frowein, regarding insurance claims on property she had lost, DeWeerth expressed regret about the missing Monet and inquired whether it was "possible to do anything about it." Frowein wrote back that the Monet would not be covered by insurance; he did not initiate an investigation. In 1955, DeWeerth sent the 1943 photograph of the Monet to Dr. Alfred Stange, a former professor of art and an expert in medieval painting, and asked him to investigate the painting's whereabouts. Stange responded that the photo was insufficient evidence with which to begin a search, and DeWeerth did not pursue the matter with him further. Finally, in 1957 DeWeerth sent a list of art works she had lost during the war to the *Bundeskriminalamt*, the West German federal bureau of investigation. None of DeWeerth's efforts during the period 1945-1957 to locate the Monet was fruitful. DeWeerth

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1 Von Palm died in June of 1983 without ever having given testimony in connection with this case. Her account of the Monet's disappearance was related in the District Court by Margarete Huber, von Palm's maid in 1945. The District Court admitted Huber's testimony under the excited utterance exception to the hearsay rule. *DeWeerth v. Baldinger*, 658 F. Supp. 688, 690 n.2 (S.D.N.Y. 1987). Our disposition of the appeal makes it unnecessary to decide whether this or some other exception to the hearsay rule applied to Huber's testimony.

made no further attempts to recover the painting after 1957.

In the meantime, the Monet had reappeared in the international art market by 1956. In December of that year, third-party defendant-appellant Wildenstein & Co., Inc., an art gallery in New York City, acquired the Monet on consignment from Francois Reichenbach, an art dealer in Geneva, Switzerland. From December 1956 until June 1957, the painting was in the possession of Wildenstein in New York, where it was shown to several prospective buyers. Defendant Edith Marks Baldinger eventually purchased the painting in June 1957 for $30,900. The parties have stipulated that Baldinger purchased for value, in good faith, and without knowledge of any adverse claim.

Since 1957, Baldinger has kept the Monet in her New York City apartment, except for two occasions when it was displayed at public exhibitions. From October 29 to November 1, 1957, it was shown at a benefit at the Waldorf-Astoria Hotel, and in 1970 it was loaned to Wildenstein for an exhibition in its New York gallery for approximately one month.

DeWeerth learned of Baldinger's possession of the Monet through the efforts of her nephew, Peter von der Heydt. In 1981, von der Heydt was told by a cousin that DeWeerth had owned a Monet that had disappeared during the war. Shortly thereafter, von der Heydt identified the painting in a published volume of Monet's works, *Claude Monet: Bibliographie et Catalogue Raisonné, Vol. I 1840-1881* (intro. by Daniel Wildenstein, La Bibliothèque des Arts, Lausanne and Paris, 1974), which he found at the Wallraf-Richartz Museum in Cologne, less than 20 miles from where DeWeerth has been living since 1957.

The *Catalogue Raisonné* indicated that the painting had been sold by Wildenstein in 1957 and that Wildenstein had exhibited it in 1970. In 1982, DeWeerth retained counsel in New York and requested Wildenstein to identify the current owner. When Wildenstein refused, DeWeerth brought an action in New York Supreme Court under N.Y. Civ. Prac. L. & R. § 3102(c) (McKinney 1970) for "disclosure to aid in bringing an action." In December 1982, the court ruled in favor of DeWeerth, and Wildenstein was compelled to identify Baldinger. By letter dated December 27, 1982, DeWeerth demanded return of the Monet from Baldinger. By letter dated February 1, 1983, Baldinger rejected the demand.

DeWeerth instituted the present action to recover the Monet on February 16, 1983.[2] At the conclusion of discovery, the parties submitted the case to Judge Broderick for decision on the record. The District Court adjudged DeWeerth the owner of the painting and ordered Baldinger to return it. The District Judge found that DeWeerth had superior title and that the action was timely as she had exercised reasonable diligence in finding the painting. *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y. 1987).

Discussion

In this diversity action, we must apply the substantive law of New York, including the applicable New York choice of law rules. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Under New York law, actions that accrue within the State are governed by the local statute of limitations, while actions that accrue outside

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2 Baldinger brought a third-party action against Wildenstein. That action has been severed pursuant to Fed. R. Civ. P. 42(b).

the State may be subject, pursuant to New York's "borrowing" statute, to the foreign jurisdiction's limitations provisions. *See Martin v. Julius Dierck Equipment Co.*, 43 N.Y.2d 583, 588-89, 403 N.Y.S.2d 185, 187 (1978); N.Y. Civ. Prac. L. & R. § 202 (McKinney 1972). However, actions that accrue outside the State are subject to a borrowed limitations period only if it is shorter than New York's. *See* N.Y. Civ. Prac. L. & R. § 202 & practice commentary 202:3 (McKinney 1972). In the present case, if DeWeerth's action is time-barred under New York's limitations law, then the action is untimely regardless of whether it accrued in New York or Germany.

The New York statute of limitations governing actions for recovery of stolen property requires that suit be brought within three years of the time the action accrued. N.Y. Civ. Prac. L. & R. § 214(3) (McKinney 1972). The date of accrual depends upon the identity of the party from whom recovery is sought. Where an owner pursues the party who took his property, the three-year period begins to run when the property was taken. *See Sporn v. M.C.A. Records, Inc.*, 58 N.Y.2d 482, 487-88, 462 N.Y.S.2d 413, 415-16 (1983). This is so even where the property owner was unaware of the unlawful taking at the time it occurred. *See Varga v. Credit-Suisse*, 5 A.D.2d 289, 291-92, 171 N.Y.S.2d 674, 677-78 (1st Dep't), *aff'd*, 5 N.Y.2d 865, 182 N.Y.S.2d 17 (1958); *Two Clinton Square Corp. v. Friedler*, 91 A.D.2d 1193, 1194, 459 N.Y.S.2d 179, 181 (4th Dep't 1983). In contrast, where the owner proceeds against one who innocently purchases the property in good faith, the limitations period begins to run only when the owner demands return of the property and the purchaser refuses. *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43, 44 (1st Dep't 1964), *on*

remand, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dep't 1967), *modification rev'd*, 24 N.Y.2d 91, 298 N.Y.S.2d 979 (1969); *Duryea v. Andrews*, 12 N.Y.S. 42 (2d Dep't 1890); *accord Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 848-49 (E.D.N.Y. 1981) (applying New York law), *aff'd*, 678 F.2d 1150, 1161 (2d Cir. 1982). Until demand and refusal, the purchaser in good faith is not considered a wrongdoer, *Gillet v. Roberts*, 57 N.Y. 28 (1874), even though this rule somewhat anomalously affords the owner more time to sue a good-faith purchaser than a thief.[3]

In the present case, it is undisputed that DeWeerth initiated her suit within three years of the date her demand for return of the Monet was refused. However,

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3 N.Y. Civ. Prac. L. & R. § 206(a) (McKinney 1972) provides that when a demand is necessary to entitle a person to commence an action, the action accrues at "the time when the right to make the demand is complete . . . ." This section has been interpreted to mean that a right to demand converted property is complete when the defendant acquires the property, whether or not the plaintiff knows the facts that gave rise to the right. *See Federal Insurance Co. v. Fries*, 78 Misc. 2d 805, 810, 355 N.Y.S.2d 741, 747 (Civ. Ct. 1974); N.Y. Civ. Prac. L. & R. practice commentary 206:1 (McKinney 1972). However, section 206(a) applies only where the demand requirement is a procedural as opposed to a substantive element of the cause of action. *Frigi-Griffin, Inc. v. Leeds*, 52 A.D.2d 805, 806, 383 N.Y.S.2d 339, 341 (1st Dep't 1976). In *Menzel v. List*, *supra*, a case involving stolen art, the New York Appellate Division held that "with respect to a bona fide purchaser of personal property a demand by the rightful owner is a substantive, rather than a procedural, prerequisite to the bringing of an action for conversion by the owner." 22 A.D.2d at 647, 253 N.Y.S.2d at 44. Since, in the pending case, the defendant is a good-faith purchaser, the statute of limitations does not begin to run until demand and refusal actually occur. *Id*; *see also Kunstsammlungen Zu Weimar v. Elicofon*, *supra*, 678 F.2d at 1161-63 (section 206 does not apply to actions to recover property from a good-faith purchaser).

the fact that her action was brought soon after refusal does not end the inquiry. Under New York law, even though the three-year limitations period begins to run only once a demand for return of the property is refused, a plaintiff may not delay the action simply by postponing his demand. Where demand and refusal are necessary to start a limitations period, the demand may not be unreasonably delayed.[4] *See Heide v. Glidden Buick Corp.*, 188 Misc. 198, 67 N.Y.S.2d 905 (1st Dep't 1947) (contract action); *Austin v. Board of Higher Education*, 5 N.Y.2d 430, 442-43, 186 N.Y.S.2d 1, 10-11 (1959) (mandamus proceeding); *Reid v. Board of Supervisors*, 128 N.Y. 364, 373, 28 N.E. 367, 369 (1891) (reimbursement for price of real estate purchased at tax sale); *Kunstsammlungen Zu Weimar v. Elicofon*, *supra*, 536 F. Supp. at 849 (recovery of stolen art). While this proscription against unreasonable delay has been referred to as "laches," the New York courts have explained that the doctrine refers solely to an unexcused lapse of time and not to the equitable principle of laches, which requires prejudice to the defendant as well as delay. *See Devens v. Gokey*, 12 A.D.2d 135, 137, 209 N.Y.S.2d 94, 97 (4th Dep't), *aff'd*, 10 N.Y.2d 898,

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4 The proscription against unreasonably delaying a demand is distinct from N.Y Civ. Prac. L. & R. § 206(a) governing the accrual of actions requiring a demand. Section 206 specifies that the statutory limitations period, *e.g.*, three years for conversion, starts as soon as the right to make a demand is complete, but this provision has been construed to apply only where the demand requirement is procedural. *See Frigi-Griffin, Inc. v. Leeds*, 52 A.D.2d 805, 806, 383 N.Y.S.2d 339, 341 (1st Dep't 1976). By contrast, the unreasonable delay rule, applicable to this case as a substantive requirement, specifies that whenever a demand would be required to start the limitations period, that demand may not be unreasonably delayed. This rule, focusing on the plaintiff's conduct, conceptually starts the limitations period at the point where the plaintiff has had an opportunity to use due diligence in locating the property and making a demand, and has failed to do so.

223 N.Y.S.2d 515 (1961); *Curtis v. Board of Education*, 107 A.D.2d 445, 448, 487 N.Y.S.2d 439, 441 (4th Dep't 1985).

Baldinger asserts that DeWeerth's action is untimely because the delay between the painting's disappearance in Europe in 1945 and DeWeerth's demand for its return in 1982 was unreasonable. DeWeerth responds that she cannot be charged with unreasonable delay before learning the identity of Baldinger in 1982 because she could not have known before that time to whom to make the demand. These contentions frame the precise issue presented by this appeal: Whether New York law imposes upon a person who claims ownership of stolen personal property an obligation to use due diligence in attempting to locate the property. DeWeerth points out that no New York court has ever held that the unreasonable delay rule applies *before* the plaintiff has learned the identity of the person to whom demand must be made. In *Glidden Buick*, *Reid*, and *Austin*, plaintiffs were barred for unreasonably delaying demands to known defendants. DeWeerth suggests that in the absence of New York authority directly on point, her actions before she discovered that Baldinger possessed the Monet cannot be subject to the unreasonable delay rule. Baldinger responds that New York courts, confronting the issue, would impose an obligation of due diligence to attempt to locate the person in possession of another's property. The District Court did not decide the issue, concluding that plaintiff had exercised due diligence in any event. 658 F. Supp. at 694.

This Court's role in exercising its diversity jurisdiction is to sit as another court of the state. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). When presented with an

absence of controlling state authority, we must "make an estimate of what the state's highest court would rule to be its law." *Stafford v. International Harvester Co.*, 668 F.2d 142, 148 (2d Cir. 1981) (quoting *Bailey Employment System, Inc. v. Hahn*, 655 F.2d 473, 477 (2d Cir. 1981)). In making that determination, this Court may consider all of the resources that the New York Court of Appeals could use, *see Francis v. INA Life Insurance Co.*, 809 F.2d 183, 185 (2d Cir. 1987), including New York's stated policies and the law of other jurisdictions. We determine that in an action for the recovery of stolen personal property, the New York Court of Appeals would not make an exception to the unreasonable delay rule for plaintiff's actions prior to learning the identity of the current possessor. Rather, we believe that the New York courts would impose a duty of reasonable diligence in attempting to locate stolen property, in addition to the undisputed duty to make a demand for return within a reasonable time after the current possessor is identified.[5]

An obligation to attempt to locate stolen property is consistent with New York's treatment of the good-faith purchaser. The purpose of the rule whereby demand and refusal are substantive elements of a conversion action against a good-faith purchaser is to protect the innocent

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5 We have elected not to submit the unresolved state law issue in this appeal to the New York Court of Appeals pursuant to the recently authorized procedure permitting that Court to answer questions certified to it by the United States Supreme Court, a United States Court of Appeals, or a court of last resort of any state. *See* N.Y. Rules of Court § 500.17 (N.Y. Ct. App.) (McKinney 1987). That valuable procedure should be confined to issues likely to recur with some frequency. *See Kidney v. Kolmar Laboratories, Inc.*, 808 F.2d 955, 957 (2d Cir. 1987). Though the issue presented by this appeal is interesting, we do not think it will recur with sufficient frequency to warrant use of the certification procedure.

party by assuring him notice before he is held liable in tort:

> The rule is a reasonable and just one, that an innocent purchaser of personal property from a wrong-doer shall first be informed of the defect in his title and have an opportunity to deliver the property to the true owner, before he shall be made liable as a tort-feasor for a wrongful conversion.

Gillet v. Roberts, *supra*, 57 N.Y. at 34; *accord Kunstsammlungen Zu Weimar v. Elicofon*, *supra*, 536 F. Supp. at 848. The rule may disadvantage the good-faith purchaser, however, if demand can be indefinitely postponed. For if demand is delayed, then so is accrual of the cause of action, and the good-faith purchaser will remain exposed to suit long after an action against a thief or even other innocent parties would be time-barred. *See*, *e.g.*, *Varga v. Credit-Suisse*, *supra*, 5 A.D.2d at 291, 171 N.Y.S.2d at 677-78 (action against converter accrues when property is taken); *Federal Insurance Co. v. Fries*, 78 Misc. 2d 805, 810, 355 N.Y.S.2d 741, 747 (Civ. Ct. 1974) (action against recipient of mistaken delivery accrues at time of delivery). As the court in *Elicofon* observed, the unreasonable delay rule serves to mitigate the inequity of favoring a thief over a good-faith purchaser. 536 F. Supp. at 849. In this case, plaintiff's proposed exception to the rule would rob it of all of its salutary effect: The thief would be immune from suit after three years, while the good-faith purchaser would remain exposed as long as his identity did not fortuitously come to the property owner's attention. A construction of the rule requiring due diligence in making a demand to include an obligation to make a reasonable effort to locate the property will prevent unnecessary

hardship to the good-faith purchaser, the party intended to be protected.

New York law governing limitations of actions also weighs in favor of a duty to attempt to locate stolen property. The New York Court of Appeals has said that

> the primary purpose of a limitations period is fairness to a defendant (*Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429, 301 N.Y.S.2d 23, 248 N.E.2d 871). A defendant should " 'be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim where the "evidence has been lost, memories have faded, and witnesses have disappeared" ' " (*id.*, quoting *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185). There is also the need to protect the judicial system from the burden of adjudicating stale and groundless claims.

Duffy v. Horton Memorial Hospital, 66 N.Y.2d 473, 476-77, 497 N.Y.S.2d 890, 892-93 (1985) (citation omitted). These policies would be frustrated if plaintiffs were free to delay actions for the return of stolen property until the property's location fortuitously came to their attention. Conceivably, those claiming to be owners, or their heirs, could wait idly for decades or even centuries before any legal obligation arose to pursue their claims. In such cases, all of the problems of lost evidence, faded memories, and unavailable witnesses would undoubtedly be exacerbated. Additionally, fraudulent and groundless claims would be encouraged as defendants would face a heavy burden of refuting proffered testimony related to events of the distant past.

A rule requiring reasonable diligence in attempting to locate stolen property is especially appropriate with respect to stolen art. Much art is kept in private collections, unadvertised and unavailable to the public. An owner seeking to recover such property will almost never learn of its whereabouts by chance. Yet the location of stolen art may frequently be discovered through investigation. *See* F. Feldman & B. Burnham, *An Art Archive: Principles and Realization*, 10 Conn. L. Rev. 702, 724 (1978) (French and Italian authorities credit stolen art registries and investigation efforts for recovery rates as high as 75%). Unlike many other items of stolen personal property, such as jewelry or automobiles, art loses its value if it is altered or disguised. Moreover, valuable works of art, unlike fungible items like stereo components, tend to be easily remembered by those who have seen them. Thus, the owner of stolen art has a better chance than most owners of stolen property in tracking down the item he has lost.

Other jurisdictions have adopted limitations rules that encourage property owners to search for their missing goods. In virtually every state except New York, an action for conversion accrues when a good-faith purchaser acquires stolen property; demand and refusal are unnecessary. *See Restatement (Second) of Torts* § 229 & comment h (1965); Prosser, *Law of Torts* 93-94 (5th ed. 1984); 51 Am. Jur. 2d *Limitation of Actions* § 125; *Federal Insurance Co. v. Fries*, *supra*, 78 Misc. 2d at 807, 355 N.Y.S.2d at 744. In these states, the owner must find the current possessor within the statutory period or his action is barred. Obviously, this creates an incentive to find one's stolen property. It is true that New York has chosen to depart from the majority view. Nevertheless, the fact that

plaintiff's interpretation of New York law would exaggerate its inconsistency with the law of other jurisdictions weighs against adopting such a view. At least one other state has recently confronted the limitations problem in the context of stolen art and has imposed a duty of reasonable investigation. *See O'Keefe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980). *See also* Comment, *The Recovery of Stolen Art: Of Paintings, Statues and Statutes of Limitations*, 27 U.C.L.A. L. Rev. 1122 (1980).

In light of New York's policy of favoring the good-faith purchaser and discouraging stale claims and the approach to actions to recover property in other jurisdictions, we hold that under New York law an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property.

The District Court found that DeWeerth undertook the following efforts to locate the Monet after she learned of its disappearance in 1945:

> In 1946 she reported the loss of the Monet to the military government then administering the Bonn-Cologne area after the end of the War. In 1948 she solicited the assistance of her lawyer, Dr. Heinz Frowein, in attempting to find and recover it. Plaintiff also made inquiries in 1955 of one Dr. Alfred Stange, known to Mrs. DeWeerth as an art expert. In 1957 she reported the Monet as missing to the *Bundeskriminalamt* (the West German federal bureau of investigation) in Bonn. All of these efforts to find the Monet were unsuccessful.

658 F. Supp. at 691. The District Court held that these efforts constituted due diligence and that DeWeerth's

demand upon Baldinger in 1982 was not unreasonably delayed. *Id.* at 695.

Plaintiff asserts that the determination of the District Court may be reversed only if clearly erroneous. She bases this assertion on her characterization of the decision below as an application of the equitable defense of laches. *See Esso International, Inc. v. S.S. Captain John*, 443 F.2d 1144, 1150 (5th Cir. 1971) (existence of laches is a question of fact subject to review under clearly erroneous standard); *DeSilvio v. Prudential Lines, Inc.*, 701 F.2d 13, 15 (2d Cir. 1983) (ruling on laches may be overturned only where trial court abused its discretion). Although Judge Broderick subsumed the laches issue into his discussion of the statute of limitations, 658 F. Supp. at 693 n.7, the two issues are distinct. Laches is an equitable defense that requires a showing of delay and prejudice to the defendant, whereas the reasonably prompt demand principle involved in this case is a legal doctrine based exclusively on an unexcused lapse of time. *See Devens v. Gokey*, *supra*, 12 A.D.2d at 137, 209 N.Y.S.2d at 97. Where, as here, the issue is the application of a legal standard—"reasonable diligence"—to a set of facts, review is *de novo*. *See Utica Mutual Ins. Co. v. Fireman's Fund Ins. Co.*, 748 F.2d 118, 122 & n.3 (2d Cir. 1984) (whether plaintiff's failure to discover a fraud was reasonable is a question of law subject to plenary review); *Reid v. Board of Supervisors*, *supra*, 128 N.Y. at 373, 28 N.E. at 369 ("What is a reasonable time [to make a demand that starts the limitations period] is *a question of law* . . . .") (emphasis added).

The question of what constitutes unreasonable delay in making a demand that starts the statute of limitations depends upon the circumstances of the case. *Id.*; *Kunst-*

sammlungen Zu Weimar v. Elicofon, *supra*, 536 F. Supp. at 849. When the action is for the return of stolen property, one of the key circumstances is the nature and value of the property at issue. *See O'Keefe v. Snyder*, *supra*, 83 N.J. at 499, 416 A.2d at 873. It has been recognized that when the property is valuable art, the search efforts that may reasonably be expected of an owner may be more exacting than where the property is of a different kind or of a lesser value. *Id.*

In *Elicofon*, we considered the issue of what search efforts may reasonably be expected of a plaintiff seeking to recover stolen art. A German museum had sought the return of two paintings by Albrecht Durer that had disappeared from Germany in 1945 and had been discovered in Brooklyn in 1966. Among the issues presented was whether the plaintiff had exercised reasonable diligence in finding the paintings. The District Court held that plaintiff's search was reasonable, and this Court affirmed. 536 F. Supp. at 852, *aff'd*, 678 F.2d at 1164 n.25, 1165. As described in the opinion of the District Court, the plaintiff's investigation "followed many channels" and "reflect[ed] a continuous and diligent search." 536 F. Supp. at 852. Specifically, the museum director informed numerous art museums and military agencies of the facts surrounding the theft. He contacted two German art museums, two American colleagues including the curator of Harvard's Germanic Museum, American military authorities, the Allied Control Council, and the Soviet Military Administration. Additionally, the loss of the Durers was made known to several organizations specifically set up to locate art stolen during the war. These included a program run by the United States Department of State as well as the Federal Republic of Germany Trust

Administration, which had taken over a program begun in Europe by the allied forces. Finally, the loss of the Durers was reported in two publications listing stolen works of art. The paintings were eventually discovered in Brooklyn because a visitor to Elicofon's home recognized the Durers from one of these publications. 536 F. Supp. at 850-52.

In contrast with the "continuous and diligent search" following "many channels" in *Elicofon*, DeWeerth's investigation was minimal. The "reports" filed with the military government and the *Bundeskriminalamt* amounted to no more than a standard form listing personal items lost during the war and a one-sentence letter submitting a list of works "I lost during and after the war." Unlike the correspondence described in *Elicofon*, neither of these reports gave any details as to how, where, or when the Monet had disappeared, nor any other information that would be essential to a credible search. DeWeerth's contacts with the lawyer Frowein and the art expert Stange were no more meaningful. She wrote to Frowein regarding her insurance coverage. She mentioned that the Monet was among the art she had lost and inquired generally, "Is it possible to do anything about it?" It is not clear whether this was a request to find the painting or simply a question about insurance coverage. In any event, when Frowein wrote back that the Monet would not be covered by insurance, DeWeerth let the matter drop. DeWeerth did ask Stange to find the Monet. But, as with Frowein, the investigation never was started; Stange replied that he had insufficient information on which to proceed, and DeWeerth then abandoned the effort.

More revealing than the steps DeWeerth took to find the Monet are those she failed to take. Conspicuously absent from her attempts to locate the painting is any effort to take advantage of several mechanisms specifically set up to locate art lost during World War II. As described in *Elicofon*, one such mechanism was a program initiated by the allied forces in Europe to handle works of art looted during the war. Under this program, Central Collecting Points (CCPs) were established throughout Germany where works of art turned in to the occupying forces were catalogued and stored until claimed by their rightful owners. In 1949, administration of the program was transferred to the German government and the paintings then located in the CCPs were given to a Trust Administration of the Federal Republic of Germany. Another program was run by the United States Department of State, which engaged in its own independent effort to locate stolen art. *Kunstsammlungen Zu Weimar v. Elicofon*, *supra*, 536 F. Supp. at 850-51. In *Elicofon*, the plaintiff corresponded with the State Department and the Trust Administration and may have contacted the CCPs as well. DeWeerth, in contrast, informed none of these agencies about the Monet, although she was aware of the CCPs; her family had attempted to recover other art from them.[6]

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6 DeWeerth asserts that the CCPs would not have been helpful in her search because, pursuant to the agreement of the allied forces, the collecting points were established to deal with property looted by the Germans in occupied territory and not with property lost in Germany. *See Kunstsammlungen Zu Weimar v. Elicofon*, *supra*, 536 F. Supp. at 852. Even if the CCPs were not specifically created to restore art stolen from Germans, they were a potentially fruitful subject of investigation and ought to have been contacted. DeWeerth acknowledged that a painting her family had lost prior to the war found its way to the CCPs and the family attempted to reclaim it.

Nor did DeWeerth publicize her loss of the Monet in any one of several available listings designed to keep museums, galleries, and collectors vigilant for stolen art. *See id.* at 851 (German publications); F. Feldman & B. Burnham, *An Art Theft Archive: Principles and Realization*, 10 Conn. L. Rev. 702, 703 n.5, 706 n.12 (1978) (American publications). As illustrated by *Elicofon*, where the painting was discovered via such a publication, this was a potentially fruitful channel of search.

Most indicative of DeWeerth's lack of diligence is her failure to conduct any search for 24 years from 1957 until 1981. Significantly, if DeWeerth had undertaken even the most minimal investigation during this period, she would very likely have discovered the Monet, since there were several published references to it in the art world. First, the Monet was pictured in the catalogues of two public exhibitions at which the painting was shown, *One Hundred Years of Impressionism, A Tribute to Durand-Ruel, A Loan Exhibition*, published in connection with an exhibition held from April 2 to May 9, 1970, at the Wildenstein Gallery in New York, and *Festival of Art*, published in connection with an exhibition held from October 29 to November 1, 1957, at the Waldorf-Astoria Hotel in New York. Second, the Monet was illustrated in a book by Daniel Wildenstein, *Monet: Impressions*, published in New York in 1967. Finally, the Monet is included in the comprehensive *Catalogue Raisonné*, *supra*. Consultation of any of these publications would likely have led DeWeerth to the Monet as each one is connected to the Wildenstein Gallery in New York, which sold the painting to Baldinger.

DeWeerth's failure to consult the *Catalogue Raisonné* is particularly inexcusable. A catalogue raisonné is a

definitive listing and accounting of the works of an artist. The Monet *Catalogue Raisonné* depicts each of Monet's works in chronological order and sets forth each work's provenance—a history of its ownership, exhibitions in which it has been shown, and published references to it. The entry for painting number 595, the one here at issue, indicates that Wildenstein sold the painting in the United States in 1957 and that it was exhibited by Wildenstein in 1970. This entry could have easily directed DeWeerth to Wildenstein. Indeed, when in 1981 DeWeerth's son learned from a cousin of the lost Monet, he was able to identify it in the *Catalogue Raisonné* within three days, which led to the identification of Baldinger shortly thereafter.

The District Court excused DeWeerth's failure to search for the Monet after 1957 on the grounds that she was elderly during this period, that published references to the Monet were not generally circulated, and that as an individual she could not be expected to mount the sort of investigation undertaken by the government-owned art museum in *Elicofon*. 658 F. Supp. at 694-95. But in 1957, when DeWeerth made her last attempt to locate the painting, she was only 63 years old. Moreover, though the published references may not have been generally circulated, they were accessible to anyone looking for them as Peter von der Heydt's quick discovery in the *Catalogue Raisonné* makes clear. Finally, although an individual, DeWeerth appears to be a wealthy and sophisticated art collector; even if she could not have mounted a more extensive investigation herself, she could have retained someone to do it for her.

This case illustrates the problems associated with the prosecution of stale claims. Gisela von Palm, the only

witness who could verify what happened to the Monet in 1945 is dead. Key documents, including DeWeerth's father's will and reports to the military authorities, are missing. DeWeerth's claim of superior title is supported largely by hearsay testimony of questionable value. Memories have faded. To require a good-faith purchaser who has owned a painting for 30 years to defend under these circumstances would be unjust. New York law avoids this injustice by requiring a property owner to use reasonable diligence in locating his property. In this case, DeWeerth failed to meet that burden. Accordingly, the judgment of the District Court is reversed.[7]

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7 Because we determine that DeWeerth's action is barred by the statute of limitations, we need not consider Baldinger's other claims with respect to laches and superior title.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SDNY
83 CIV 1233
BRODERICK (0866)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of December one thousand nine hundred and eighty-seven.

Present: HON. WILFRED FEINBERG,
CHIEF JUDGE,
HON. JON O. NEWMAN,
HON. RALPH K. WINTER,
Circuit Judges,

Docket Nos. 87-7392, 87-7402

GERDA DOROTHEA DEWEERTH,

Plaintiff-Appellee,

—V—

EDITH MARKS BALDINGER,

Defendants-Third-Party Plaintiff-Appellant,

—V—

WILDENSTEIN & CO., INC.,

Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH
Clerk

/s/ Edward J. Guardaro

By: Edward J. Guardaro
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 1233 (VLB)

OPINION AND ORDER

GERDA DOROTHEA DE WEERTH,

Plaintiff,

– against –

EDITH MARKS BALDINGER,

Defendant and Third-Party Plaintiff,

– against –

WILDENSTEIN & CO., INC.,

Third-Party Defendant.

VINCENT L. BRODERICK, U.S.D.J.

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Jeremy G. Epstein, Esq.
Of Counsel

VINCENT L. BRODERICK, U.S.D.J.

I.

Plaintiff Gerda Dorothea DeWeerth seeks the return from defendant Edith Marks Baldinger of a painting by Claude Monet entitled "Champs de Blé à Vetheuil" ("the Monet").

A bench trial was had before me on a "submitted" basis, in which written and videotaped depositions and the exhibits were made available to me. This opinion contains my findings of fact and conclusions of law. [1]

II.

The court has jurisdiction of the action under 28 U.S.C. § 1332(a)(2); Mrs. DeWeerth is a citizen of the Federal Republic of Germany, and Mrs. Baldinger is a citizen of the State of New York. The Monet which is the subject of this action is worth more than $10,000.

Venue is proper under 28 U.S.C. § 1391(a).

The Monet is an impressionistic depiction in oil of a wheat field, a village and trees near Vetheuil, France. It measures 65 centimeters by 81 centimeters, and is signed and dated "Claude Monet '79".

Mrs. DeWeerth's father, Karl von der Heydt, purchased the Monet in or about 1908, and he thereafter kept it in his house in Bad Godesberg, West Germany. Plaintiff inherited the Monet from her father after his death on August 9, 1922, in the division of the works and objects of art in his estate. With the exception of the years 1927 to 1929, when the Monet was kept in her mother's house, plaintiff kept the Monet in her residence in Wuppertal-Elberfeld from 1922 until August 1943, where it was on display on a wall next to a sculpture by Auguste Rodin, also inherited from her father. This sculpture is still in plaintiff's possession at her West German residence, and plaintiff has submitted a 1943 photograph showing the Monet and the Rodin displayed

together in her residence. From that time until the present, she neither sold nor otherwise disposed of the Monet, nor did she entrust the Monet to anyone else to sell or otherwise dispose of it.

In August 1943, during the Second World War (the "War"), Mrs. DeWeerth sent the Monet, along with the Rodin sculpture and other valuables, by van to her sister Gisela von Palm (now deceased) in Oberbalzheim in Southern Germany, for safekeeping. Although the van arrived, plaintiff never saw the Monet again. In the fall of 1945, Gisela von Palm informed plaintiff of the disappearance of the Monet from Mrs. von Palm's house in Oberbalzheim. There is no direct evidence as to what caused the disappearance of the Monet. American soldiers were quartered in the house after the close of the War in 1945, and it was after they had left that its disappearance was noted. I infer that either one of those soldiers, or someone else, stole the painting from the von Palm house where it had been sent for safekeeping.[2]

Mrs. DeWeerth was approximately 50 years old when she learned of the Monet's disappearance. Subsequently, she made efforts to locate it. In 1946 she reported the loss of the Monet to the military government then administering the Bonn-Cologne area after the end of the War. In 1948 she solicited the assistance of her lawyer, Dr. Heinz Frowein, in attempting to find and recover it. Plaintiff also made inquiries in 1955 of one Dr. Alfred Stange, known to Mrs. DeWeerth as an art expert. In 1957 she reported that Monet as missing to the *Bundeskriminalamt* (the West German federal bureau of investigation) in Bonn. All of these efforts to find the Monet were unsuccessful.

By December 1956 however, the Monet had found its way to the United States through Switzerland. Third-party defendant Wildenstein & Co., Inc. ("Wildenstein"), an art gallery in New York City, appears to have acquired the Monet on consignment from Francois Reichenbach, an art dealer from Geneva, Switzerland, in about December 1956. From December 1956 to June 1957, Wildenstein had possession of the Monet in New York. A Wildenstein record shows a 1962 payment, or credit, to Reichenbach, evidently for the Monet.

In June 1957, Wildenstein delivered the Monet for inspection to Mrs. Baldinger at her residence at 710 Park Avenue, New York, New York. Mrs. Baldinger, after several days, purchased the Monet in good faith and for value from Wildenstein on or about June 17, 1957.

After its purchase by Mrs. Baldinger, the Monet was publicly exhibited only on two occasions. Mrs. Baldinger exhibited the Monet at a benefit held in the Waldorf-Astoria Hotel in New York City, from October 29 to November 1, 1957, and loaned it to Wildenstein for display during a Wildenstein exhibition entitled "One Hundred Years of Impressionism" held April 2 to May 9, 1970 at its gallery in New York City. At the close of this exhibition, Wildenstein returned the Monet to Mrs. Baldinger. Except for those two exhibitions, Mrs. Baldinger maintained the Monet exclusively in her residence at 710 Park Avenue, New York City, from June 1957 to the present date.

There are only four published references to the Monet in the art literature: two of them are in catalogues in connection with the exhibitions already cited, and the other two are in publications with which Wildenstein was apparently connected:

(1) *Claude Monet: Bibliographie et Catalogue Raisonne, Vol. 1 1840-1881.* Published by la Bibliotheque des Arts, Lausanne, Paris; introduction by Daniel Wildenstein; collaborators Rodelphe Walter, Sylvie Crussard, and the Foundation Wildenstein, 1974, Geneva; painting no. 595.

(2) The exhibition catalogue *One Hundred Years of Impressionism, A Tribute to Durand-Ruel, A Loan Exhibition*, April 2 - May 9, 1970, Wildenstein Gallery, New York; painting no. 43.

(3) *Monet: Impressions*, Daniel Wildenstein, published in New York, 1967, Library of Congress call no. ND553.M76W5313.

4) The exhibition catalogue *Festival of Art*, October 29-November 1, 1957, Waldorf-Astoria Hotel, New York; item 125.

In or soon after July 1981, plaintiff, through the efforts of her nephew Peter von der Heydt, discovered that the Monet had been exhibited in 1970 at the aforementioned Wildenstein loan exhibition. Plaintiff thereafter retained counsel in New York in 1982 to determine whether Wildenstein knew the identity of the present possessor of the Monet. When Wildenstein refused to disclose the possessor's identity or the Monet's whereabouts, plaintiff commenced a proceeding in November, 1982 against Wildenstein in New York State Supreme Court seeking "disclosure to aid in bringing an action" under N.Y.C.P.L.R. § 3102(c). On December 1, 1982, the State Supreme Court found for the plaintiff, ordering Wildenstein to reveal the identity of the possessor. Plaintiff thereafter learned that defendant Baldinger possessed the Monet.

By letter to Baldinger dated December 27, 1982, plaintiff demanded return of the Monet. By letter dated February 1, 1983, Baldinger refused the demand. This action ensued.

III.

Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), in this diversity action I must apply the same substantive law that New York would apply, including New York's choice of law rules. Thus the initial question is whether, under New York choice of law theory, German or New York law is applicable to determine who owns the Monet.

In resolving this issue, I am guided by *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 845 (E.D.N.Y. 1981), *aff'd.*, 678 F.2d 1150, 1160 (2d Cir. 1982)("*Elicofon*"), a case upon which both parties rely. In *Elicofon*, a diversity action brought by a German government art museum seeking recovery of two stolen paintings, involving both East and West Germany, a foreign national, and an American citizen, the court was required to determine the ownership of two Albrecht Duerer portraits executed around 1499. These portraits had been stolen in 1945 from a castle

in what is now East Germany and discovered in 1966 at the New York residence of Elicofon, an American citizen, who alleged that he had purchased them in good faith 20 years earlier from an American ex-serviceman who appeared at his Brooklyn home and represented that he had bought them while in Germany. On cross-motions for summary judgment, the district court held for the German government art museum and against Elicofon, finding that the art museum had sufficient ownership interest in the paintings to pursue the action. In doing so, the district court ruled that German law[3] was not applicable to determine whether Elicofon acquired title to the paintings. It found that "New York's choice of law dictates that questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer." 536 F. Supp. at 846 (*citations omitted*). Moreover, it noted that the same result would obtain if it applied the "significant relationship" analysis often invoked by New York courts to the facts of the case, that is, if it determined which state had the most significant relationship to the chattel and to the parties. *Id.*

Applying either analysis dictated the same result in *Elicofon*: New York law applied. The court ruled that "Germany's connection with the controversy [was] not sufficient to justify displacing the rule of *lex loci delictus*." *Id. citing Neumeier v. Kuehner*, 335 N.Y.S.2d 64, 71 (Ct. App. 1972). It found the fact that the theft of the paintings occurred in Germany was "totally irrelevant to the policy of [German law] to protect bona fide purchasers so as to promote the security of transactions." *Id.* Instead, it found significant contacts with New York:

> In contrast, the contacts of the case with New York, i.e., Elicofon purchased and holds the paintings here, are indeed relevant to effecting its interest in regulating the transfer of title in personal property in a manner which best promotes its policy. The fact that the theft of the paintings did not occur in New York is of no relevance. In applying the New York rule that a purchaser cannot acquire good title from a thief, New York courts do not concern themselves with the question of

> where the theft took place, but simply whether one took place. Similarly, the residence of the true owner is not significant for the New York policy is not to protect resident owners, but to protect owners generally as a means to preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods. In finding that New York governs the question of title, we hold that Elicofon did not acquire title under [German law].

Id. at 846.[4]

Under *Elicofon*, I find that the law of New York governs all issues in this case, including the question of which party has the superior right to possession of the Monet. New York is the place where the sale of the painting to Mrs. Baldinger occurred and where the Monet is and has been located. The fact, as in *Elicofon*, that the theft of the Monet took place in Germany and not New York is irrelevant, as is the fact that Mrs. DeWeerth is a resident of Germany and inherited the painting while in Germany. New York policy, as described in *Elicofon*, is to protect owners generally "as a means to preserve the integrity of transactions and prevent the state from becoming a market place for stolen goods." This policy warrants the application of New York law in the case before me.[5]

IV.

Having determined that New York law applies, I turn to the merits of the case. Defendant has argued initially that plaintiff's action should be barred both by the defense of laches[6] and the statute of limitations governing actions for recovery of a chattel due to her long delay in asserting her claim, and also because she has not diligently sought to discover the painting's whereabouts until now.[7]

It is not disputed that Mrs. Baldinger acquired the Monet in 1957; that Mrs. DeWeerth upon discovering in December, 1982 that defendant had the painting, demanded return of the Monet on December 27, 1982 and that defendant refused the demand

on February 1, 1983; and that on February 16, 1983 plaintiff instituted this action. Mrs. Baldinger asserts that plaintiff's claim is barred by the three year statute of limitations contained in N.Y.C.P.L.R. § 214(3).[8]

Under N.Y.C.P.L.R. § 214(3) the three year statute of limitations does not commence running until a demand is made to return the property and the demand is refused. *See Elicofon*, 536 F.Supp. at 848 *citing Frigi-Griffin Inc. v. Leeds*, 383 N.Y.S.2d 339 (1st Dept. 1976), *aff'd.*, 678 F.2d at 1161.[9] Thus when Mrs. DeWeerth instituted her suit in 1983, it was well within three years of accrual of the cause of action and timely under New York law.

It is also true as a matter of New York law that "a party may not unreasonably delay in making a demand which starts the running of the limitations period." *Elicofon*, 536 F. Supp. at 849 *citing Heide v. Glidden Buick Corp.*, 67 N.Y.S.2d 905 (1st Dept. 1947). "The question of what constitutes a reasonable time to make a demand depends upon the circumstances of the case." *Elicofon*, 536 F. Supp. at 849 *citing Reid v. Board of Supervisors*, 128 N.Y. 364 (1891); *Nyhus v. Travel Management Corp.*, 466 F.2d 440 (D.C.Cir. 1972). Mrs. Baldinger claims that Mrs. DeWeerth did little to locate the Monet and nothing to publicize her loss, and what steps she did take to locate the painting were inadequate. Therefore, Mrs. Baldinger argues that Mrs. DeWeerth's claim is barred by virtue of her lack of diligence in locating and claiming the painting as her own, and by virtue of the unreasonableness of the delay in commencing her suit.

Defendant cites *Elicofon* for the proposition that an initial demand must be made within a reasonable time and that plaintiff has a duty to make genuine and diligent efforts to ascertain who had the painting so as to be able to make her demand. In *Elicofon*, defendant claimed that it was plaintiff's duty to make "genuine and diligent efforts to find the paintings" and because plaintiff failed to make such efforts "any delay in making a demand for the paintings was unreasonable." 536 F. Supp. at 849. Plaintiff in *Elicofon* rejected the contention that it had a duty

to look diligently for the paintings, and suggested that "its only duty was to make the demand once it knew of the location of the paintings." *Id.* The court in *Elicofon* did not decide the issue because "the undisputed evidence clearly demonstrate[d] that the [plaintiff] made a diligent although fruitless effort to locate the paintings." *Id.* at 849-50.

The same is true in this case.

After she learned from her sister that the Monet was missing, Mrs. DeWeerth set out on a course to locate and recover it. I have already found that (1) in 1946, she reported its loss to the military government then administering the Bonn-Cologne area after the end of the War; (2) in 1948, she solicited the assistance of her lawyer in endeavoring to find it; (3) in 1955, she made inquiries to an art expert she knew of; and (4) in 1957, she reported it as missing to the *Bundeskriminalamt*. Thus plaintiff made a "diligent although fruitless effort" to find the Monet through 1957. I am further persuaded that upon the circumstances of this case the plaitniff's failure to pursue the Monet after 1957 until her nephew discovered in 1981 that the Monet had been exhibited in New York was reasonable. Mrs. DeWeerth was an elderly woman during that period, and the only published references to the Monet were not generally circulated.

Moreover, any comparison with *Elicofon* is inapposite. There the plaintiff was a government-owned art museum, with resources, knowledge and experience that far exceeded any means an individual such as Mrs. DeWeerth could muster to carry on a credible search for a missing painting.

For all of these reasons, I find that plaintiff did not unreasonably delay her demand for the return of the Monet, and her action is not barred on timeliness grounds.[10]

V.

Mrs. Baldinger contends that even if plaintiff's claim to recover the Monet is timely, plaintiff has not established a superior right to possession of the painting by failing to prove that she owns

the painting, and that the painting was stolen. She argues that Mrs. DeWeerth has not demonstrated her own prior valid title to the Monet to recover the painting from Mrs. Baldinger, who has possessed it as a good faith purchaser for over 25 years. I disagree.

To establish a cause of action in an action sounding in replevin[11] under New York law, Mrs. DeWeerth must show that she has an immediate and superior right to possession of the Monet. *Wurdeman v. Miller*, 633 F. Supp. 20, 22 (S.D.N.Y. 1986) *citing Honeywell Information Systems, Inc. v. Demographic Systems, Inc.*, 396 F. Supp. 273, 275 (S.D.N.Y. 1975), including proof of ownership. *Elicofon*, 536 F. Supp. at 852 *citing Honeywell Information Systems, Inc., supra.*

Through her testimony and the documentary evidence submitted at trial,[12] Mrs. DeWeerth has established that she was the owner of the Monet by inheritance from her father at the time it disappeared from her sister's home, and that she neither sold it nor entrusted it to anyone else to sell. Her testimony with respect to the 1943 photograph further supports that the Monet displayed in 1943 in her residence next to the Rodin sculpture is the same painting as is currently possessed by defendant.

Mrs. Baldinger, who indisputably purchased the Monet in good faith and for value from Wildenstein in 1957,[13] would prevail only if she could trace her title back to Mrs. DeWeerth. This she cannot do. The trail back from Mrs. Baldinger leads through Wildenstein to Reichenbach, and stops there. There is no evidence before me with respect to how Reichenbach came into possession of the Monet.

Moreover, under New York law not even a bona fide purchaser can acquire valid title of a chattel from a thief, or from one who acquired the property from a thief. *See Elicofon*, 678 F.2d at 1160. I have inferred that the painting was stolen during the occupation of Frau von Palm's house by American soldiers, after plaintiff had sent the painting to her sister's house for safekeeping with no intention that it be sold. The defendant has introduced no

evidence to the contrary. Rather, she has sought to shift the burden to plaintiff to prove that the painting was stolen and not sold or consigned by Frau von Palm. However, the burden of proof rests with the defendant to show some act by the plaintiff beyond merely entrusting his property to someone who then sells it to an innocent purchaser. *Cf. Hartford Accident & Ind. Co. v. Walston & Co.*, 287 N.Y.S.2d 58, 68 (Ct. App. 1967) (stockbroker required to establish that it observed reasonable commercial standards in transferring stocks to establish it was bona fide purchaser to avoid liability to owner from whom they were stolen); *United States Fidelity & Guaranty Co. v. Leon*, 300 N.Y.S. 331, 334 (Municipal Ct. N.Y. Co. 1937) (burden of proof upon defendant if he is asserting title to stolen bond to show he is bona fide holder and if he is asserting title in his predecessor, that the latter was a bona fide holder).

Mrs. DeWeerth has thus established a superior right to possession of the Monet.

VI.

A. *Defendant's Counterclaim*

Defendant has alleged a counterclaim seeking damages for her "considerable personal distress and anguish" occasioned by plaintiff's claim that she is a converter, and for the diminution in value of the Monet caused by this litigation. Answer and Counterclaim ¶¶ 11-13.

Whether characterized as a claim for intentional infliction of emotional distress or as a claim for malicious prosecution, as plaintiff construes it, the counterclaim is without merit.

The New York Court of Appeals has ruled that to set forth a viable cause of action for intentional infliction of emotional distress, the allegations must:

> ...satisfy the rule set out in Restatement of Torts, Second, which we adopted in *Fischer v. Maloney*, 43

> N.Y.2d 553, 557, 402 N.Y.S.2d 991, 373 N.E.2d 1215, that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (§46, subd. [1]). Comment d to that section notes that: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Murphy v. American Home Products Corp., 461 N.Y.S.2d 232, 236 (Ct. App. 1983).

The conduct complained of falls far short of these requirements.

Any attempt by defendant to assert a claim for malicious prosecution is premature:

> [T]hat tort lies only when the judicial proceeding "begun in malice, without probable cause, . . . finally ends in failure." It cannot be asserted as a counterclaim in the very action it challenges as malicious.

Bank of Boston International of Miami v. Arguello Tefel, 644 F. Supp. 1423, 1430 (E.D.N.Y. 1986) *citing Kalso Systemet, Inc. v. Jacobs*, 474 F. Supp. 666, 670 (S.D.N.Y. 1979) (quoting *Grant v. City of Rochester*, 326 N.Y.S.2d 691, 693 (Sup. Ct. 1971)).

Moreover, this claim is without merit because:

> [i]n order to establish a claim for malicious prosecution, . . . a plaintiff must show among other matters that there was some interference with his person or property. This requirement is satisfied only if a court issues a provisional remedy, such as an attachment, an order of arrest or an injunction. No such remedy was issued in connection with [this] proceeding.

Id. citing Tedeschi v. Smith Barney, Harris Upham & Co., Inc., 548 F. Supp. 1172 (S.D.N.Y. 1982).

B. *Remaining Affirmative Defenses*[14]

1. *Adverse Possession*

"Five elements must be established in order to gain title by adverse possession: possession must be hostile and under claim of right, it must be actual, it must be open and notorious, it must be exclusive and it must be continuous." *Risi v. Interboro Industrial Parks, Inc.*, 470 N.Y.S.2d 174, 175 (2d Dept. 1984) *citing Belotti v. Bickhardt*, 228 N.Y. 296 (Ct. App. 1920). The Second Circuit in *Elicofon* observed that "[c]ourts and commentators have noted that the mere residential display of paintings may not constitute the type of open and notorious possession sufficient to afford notice to the true owner." 678 F.2d at 1164 n. 25 (citations omitted).

Except for two brief public exhibitions, one in 1957 for four days and the other in 1970 for a little more than a month, Mrs. Baldinger maintained the Monet exclusively in her home. Such possession is not sufficiently open and notorious to constitute adverse possession, and this defense must fail.

2. *Gratuitous Bailment*

Defendant has also argued that plaintiff has no right to possession of the painting because she made a gratuitous bailment of the Monet. This contention is also without merit.

A gratuitous bailment is one for the benefit of the bailor only. *Pettinelli Motors, Inc. v. Morreale*, 242 N.Y.S.2d 78, 80 (Sup. Ct. Oneida Co. 1963).

Under New York law, a bailment is defined as:

> "[a] delivery of personal property for some particular purpose, or a mere deposit, upon a contract express or implied, and that after such purpose has been fulfilled

> it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it."

Rich v. Touche Ross & Co., 415 F. Supp. 95, 99 n. 2 (S.D.N.Y. 1976) *citing Mays v. New York, N.H. & H.R.Co.*, 97 N.Y.S.2d 909, 911 (1st Dept., App.T. 1950).

> A bailment "describes a result which in many instances does not flow from the conscious promises of the parties made in a bargaining process but from what the law regards as a fair approximation of their [intentions]."

Id. citing Ellish v. Airport Parking Co., 345 N.Y.S.2d 650 (2d Dept. 1973), *aff'd on opinion below*, 359 N.Y.S.2d 280 (1974).

As a threshold matter, it is questionable whether plaintiff's delivery of the Monet to her sister for safekeeping during the War constituted a bailment. Even if it did, however, the fact that it was gratuitous has no relevance to the issue of title to the painting.

VII.

In summary, plaintiff has shown by a fair preponderance of the credible evidence that she owned the Monet, that she did not sell it or authorize anyone to sell it on her behalf, and that defendant Baldinger currently has it in her possession and refuses to return it. The affirmative defenses and the counterclaim are without merit and are dismissed with prejudice. Judgment shall be rendered for the plaintiff and defendant is directed to deliver the painting to her. [15]

Plaintiff's counsel will submit a final judgment on notice pursuant to Rule 54, F.R.Civ.P. There is no just reason for delay.

A conference in this case will be held on May 7, 1987 at 9 a.m. in courtroom 2703 to chart the further course of the third-party litigation.

SO ORDERED.

/s/Vincent L. Broderick

VINCENT L. BRODERICK,
U.S.D.J.

Dated: New York, New York
April 20, 1987

FOOTNOTES

[1] Mrs. Baldinger has brought a third-party action against Wildenstein & Co., Inc., a New York art dealer, from whom she bought the Monet in 1957. The pre-trial order provided for separate trials of Mrs. DeWeerth's claim against Mrs. Baldinger and Mrs. Baldinger's claim against Wildenstein. This opinion only addresses the primary action.

[2] This inference is supported by, *inter alia*, the testimony of Frau Huber, who worked for Mrs. von Palm at the time of the painting's disappearance, and who testified that Mrs. Palm was very upset when she discovered that the painting was missing. Evidence admissible under the excited utterance or res gestae exception to the hearsay rule can be used to prove the happening of a startling event. *Insurance Co. v. Mosley*, 8 Wall. 397, 19 L.Ed. 437 (1869); *Stewart v. Baltimore & O.R. Co.*, 137 F. 2d 527, 529-30 (2d Cir. 1943); *see* 4 Weinstein's Evidence ¶803(2) [01] at 803-88 (1985).

[3] Specifically, Elicofon asserted acquisition of title under the German law doctrine of *Ersitzung*, under which "title to movable property may be obtained by a good faith acquisition of the property plus possession of it in good faith, and without notice of a defect in title, for the statutory period of ten years from the time the rightful owner loses possession." *See Elicofon*, 536 F. Supp. at 845.

[4] The Second Circuit affirmed the district court's choice of law rulings, "substantially for the reasons stated in the district court's opinion." 678 F. 2d at 1160.

[5] It is true that the court in *Elicofon* considered German law governing the question of succession. However, to the extent that German law should apply to the issue of plaintiff's inheritance of the Monet, neither party has demonstrated that German law differs from New York law, and I have not embarked on an independent investigation of the question. *See Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank N.A.*, 731 F.2d 112, 121 (2d Cir. 1984) *citing Cousins v. Instrument Flyers, Inc.*, 405 N.Y.S.2d 441 (Ct.App. 1978); *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 n. 3 (2d Cir. 1968), *cert. den.* 393 U.S. 826 (1968).

Moreover, the issue is in essence whether the evidence of plaintiff's possession of the Monet is sufficient under New York law to entitle her to possession. In any event, I have found as a matter of fact that plaintiff inherited the Monet from her father and the issue of whether German law applies is irrelevant.

[6] The defense of laches is composed of four elements which must be established by the defendant:

> (1) conduct on the part of the defendant . . . for which the complainant seeks a remedy;
>
> (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit;
>
> (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and
>
> (4) injury or prejudice to the defendant in the event that relief is accorded to the complainant or that the suit is not held to be barred.

Dedvukaj v. Madonado, 453 N.Y.S.2d 965, 968 (N.Y. City Civ. Ct. 1982) *citing* 36 N.Y. Jur., Limitations & Laches, Sec. 153 at 141 (1964).

[7] Among the affirmative defenses asserted by defendant are laches, statute of limitations, failure to exercise due diligence in pursuit of a claim, waiver, and estoppel. Because all of these defenses raise essentially the same issue — whether plaintiff's claim to recover the Monet was timely and not unreasonably delayed — I treat all of these defenses together in this section. Defendant herself concedes this point, at least with respect to the overlap between laches and statute of limitations. *See* Joint Trial Brief of Defendant and Third-Party Defendant at 11* *citing*

Bohemian Brethren Presbyterian Church v. Greek Archdiocesan Cathedral of the Holy Trinity, 405 N.Y.S.2d 926, 929 (Sup.Ct. N.Y. Co. 1978), *aff'd.*, 416 N.Y.S.2d 751 (1st Dept. 1979); *Elicofon*, 536 F.Supp. at 852 n. 20.

[8] N.Y.C.P.L.R. § 214 provides:

> The following actions must be commenced within three years: . . .
>
> 3. an action to recover a chattel or damages for the taking or detaining of a chattel;

[9] The Second Circuit also held that even if the cause of action had accrued in 1946, when Elicofon bought the paintings, "the then-applicable limitation period was tolled under New York's judicially-created 'non-recognition' toll because the United States did not recognize GDR until 1974, which precluded the [plaintiff] from intervening until then."

678 F.2d at 1161.

[10] Even if plaintiff had unreasonably delayed her demand, defendant cannot show that she was prejudiced by the delay. She has argued that because of the delay the testimony of Frau von Palm, the only person who could testify as to what happened to the painting, has been irretrievably lost. This argument fails because it assumes, contrary to all the other evidence presented, that Frau von Palm's testimony would have been favorable to her.

It also fails because it is simply not true. Defendant could have deposed Reichenbach to attempt to trace the history of the painting's transfers, but she did not. Having failed to exhaust obvious paths of inquiry she cannot sustain her burden of proving that she was prejudiced.

Neither has she shown that plaintiff's delay was so prolonged and inexcusable as to amount to an abandonment of her right to the painting, *see Tiffany & Co. v. L'Argene Products Co.*, 324 N.Y.S.2d 326, 330-31 (Sup. Ct. N.Y. Co. 1971), *aff'd.* 323 N.Y.S.2d

642 (1st Dept. 1971), *app. dis'd.* 324 N.Y.S.2d 1030 (1971); *Kalisch-Jarcho, Inc. v. City of New York*, 461 N.Y.S.2d 746, 750 n. 8 (Ct. App. 1983), or to constitute a waiver of her rights and claims. Defendant's affirmative defense of estoppel in this context is also without merit.

[11] According to the Practice Commentaries to Article 71 of the C.P.L.R., replevin is a term that is no longer used in the C.P.L.R., and is not synonymous with an action to recover a chattel. It is "a procedure in the nature of a provisional remedy, which may be used as an incident to such action, by which an officer seizes the chattel before judgment. Both under the CPA and the C.P.L.R. an action to recover a chattel may proceed without seizure of the chattel." McLaughlin, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., Book 7B, C.P.L.R. C7101:1 *et seq.* at 170-72. In any event, the Practice Commentaries suggest that an action under Article 71 "is one to establish a possessory right to a chattel superior to that asserted by defendant." *Id. See also East Side Car Wash, Inc. v. K.R.K. Capitol, Inc.*, 476 N.Y.S.2d 837, 840 (1st Dept. 1984). Whether characterized as an action sounding in replevin or an action to recover a chattel, the burden is still on the plaintiff to establish that she has a superior right to possession.

[12] The relevant exhibits, specifically the 1943 photograph (exhibit 5), have been in existence 20 years or more and thus contain hearsay admissible under the ancient documents exception of Fed. R. Evid. 803(16). Mrs. Baldinger admits the authenticity of these exhibits.

[13] Because she acquired the painting from Wildenstein in 1957, seven years prior to New York's adoption of the Uniform Commercial Code, pre-Code law is controlling.

This is so because pursuant to § 10-101 and § 10-105, subsequently renumbered § 13-101 and § 13-105, the Uniform Commercial Code in New York applies to "transactions entered into and events occurring on and after the effective date specified in Section 10-105 of this Act [September 27, 1964]."

Mrs. Baldinger relies heavily on U.C.C. 2-403, although she concedes that under both the U.C.C. and pre-U.C.C. law, title conveyed by a thief is void.

[14] I have already considered and rejected all but two of the affirmative defenses: (1) failure to state a claim upon which relief can be granted; (2) statute of limitations; (3) laches; (4) failure to exercise due diligence in pursuit of a claim, waiver and estoppel; (5) good title; and (6) abandonment.

[15] Because the Monet is a "unique chattel", I may exercise my equitable jurisdiction to enter a judgment directing Mrs. Baldinger to deliver the painting to Mrs. DeWeerth. *See Elicofon*, 536 F. Supp. at 859 *citing* C.P.L.R. § 7109; *Chabert v. Robert & Co.*, 76 N.Y.S.2d 400 (1st Dept. 1948); *Raftery v. World Film Corp.*, 167 N.Y.S. 1027 (1st Dept. 1917).

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 5th day of February one thousand nine hundred and eighty-eight.

Docket No. 87-7392, 87-7402

GERDA DOROTHEA DEWEERTH,

Plaintiff-Appellee,

—against—

EDITH MARKS BALDINGER,

Defendants-Third-Party Plaintiff-Appellant,

and

WILDENSTEIN & CO., INC.,

Third-Party Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee DEWEERTH.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith

Elaine B. Goldsmith
Clerk

No. 87-1752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GERDA DOROTHEA DE WEERTH,

Petitioner,

vs.

EDITH MARKS BALDINGER AND
WILDENSTEIN & CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF IN OPPOSITION

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May 23, 1988

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reviewing *de novo* the district court's construction and application of a legal standard to a set of undisputed facts?

2. Did the Court of Appeals abuse its discretion in refusing to certify a question of state law to the state's highest court where: (1) no party to the appeal requested certification; (2) the party now demanding certification chose a federal forum to litigate a state law claim; and (3) the Court of Appeals is familiar with the state law in issue?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF IN OPPOSITION

Edith Marks Baldinger and Wildenstein & Co., Inc. ("Wildenstein")[1] respectfully submit this joint brief in opposition to the petition for a writ of *certiorari* of Gerda Dorothea De Weerth (the "Petition").

1 Wildenstein has no parent companies, subsidiaries or affiliates.

STATEMENT OF THE CASE

This common law diversity case concerns a dispute over the ownership of a painting by Claude Monet entitled "Champs de Blé à Vétheuil" (the "painting" or the "Monet").[2] The painting was purchased in 1957 by respondent Edith Marks Baldinger (then Mrs. Carl Marks) from respondent Wildenstein, a New York art gallery and dealer. Mrs. Baldinger purchased the painting in good faith, and without notice of any adverse claim, for $30,900.

Petitioner De Weerth, a German citizen residing in Bonn-Bad Godesberg, West Germany, claims that her father purchased the Monet in or about 1908. She also claims that she inherited it from her father upon his death in 1922, and that it remained in her possession until August, 1943. In that month, De Weerth claims that she sent the painting in a furniture van to her sister, Gisela von Palm, at her castle in Oberbalzheim, in southern Germany, for safekeeping during World War II. De Weerth alleges that she never saw the painting again.

The painting allegedly disappeared from Mrs. von Palm's custody.[3] Upon learning of the loss of the painting, De Weerth, whom the Court of Appeals described as a "wealthy and sophisticated art collector," 836 F.2d at 112, took only four steps in 35 years to locate it. First, in 1946 (a year after the alleged loss), she allegedly filed a report with the military government then administering Germany. No documentary proof of any such report was offered at trial. Second, in 1948, she wrote a

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2 Respondents also adopt the statement of facts contained in the opinion of the United States Court of Appeals for the Second Circuit. *De Weerth v. Baldinger*, 836 F.2d 103, 104-06 (2d Cir. 1987).

This statement of the case makes no effort to correct the various factual misstatements contained in the Petition. None of these misstatements is relevant to the issue of whether or not *certiorari* should be granted.

3 Mrs. von Palm, the only witness competent to testify about the disposition of the painting, died on June 11, 1983, four months after the present action was commenced. De Weerth did not preserve her testimony.

letter to a lawyer, Dr. Heinz Frowein, concerning the Monet and several other paintings and art objects lost during the War. Dr. Frowein replied that De Weerth's insurance company would not indemnify her for the missing painting "because we cannot prove that it was a case of burglary." Frowein did nothing further. Third, in 1955, De Weerth sent a photograph of the Monet to Dr. Alfred Stange, a historian of medieval art who possessed no expertise in French Impressionist painting. Dr. Stange advised De Weerth that her evidence was insufficient and did nothing. Fourth, and finally, in 1957, De Weerth filled out a report for the *Bundeskriminalant* listing art works lost during the War. A copy of the report was not offered at trial. De Weerth did nothing to locate the painting after 1957.

The Court of Appeals observed that "[c]onspicuously absent from [De Weerth's] attempts to locate the painting is any effort to take advantage of several mechanisms specifically set up to locate art lost during World War II." 836 F.2d at 111. Pursuant to an agreement among the Allies, Central Collecting Points ("CCP") were established throughout Germany, where recovered works of art were identified and stored, and where the owners of missing works could inquire after their property. De Weerth knew of the CCP's presence in post-War Germany and its role in collecting lost works of art and facilitating their return. She never contacted any CCP regarding the Monet.

The United States also conducted its own independent program to recover art work stolen during World War II. In the post-War period, the American Commission for the Production and Salvage of Artistic and Historic Monuments in War Areas ("American Commission") sent letters to museums, libraries, universities and art dealers identifying missing works of art and requesting assistance in locating them. The State Department also initiated a program to return works of art displaced during World War II. De Weerth failed to avail herself of these resources. Nor did she ever contact or retain any other museum, investigative agency, attorney, art expert or private investigator to assist her in locating the Monet.

De Weerth never looked for mention of the Monet in art publications. The Court of Appeals noted that "if De Weerth had undertaken even the most minimal investigation during this period [1957-1981], she would very likely have discovered the Monet, since there were several published references to it in the art world." 836 F.2d at 112. The Monet was twice displayed at public exhibitions and was also mentioned in four different published works during this period. The two public exhibitions were the *Festival of Art*, an exhibition held at the Waldorf-Astoria Hotel in New York in 1957, and *One Hundred Years of Impressionism*, an exhibition held at Wildenstein's gallery in New York in April, 1970. The Monet was mentioned in both exhibition catalogues; in addition, the Monet was illustrated in a book by Daniel Wildenstein entitled *Monet: Impressions*, published in New York and Lausanne, Switzerland in 1967. Finally, the Monet is described, photographed, and identified in the work *Claude Monet: Bibliographie et Catalogue Raisonné, Volume I, 1840-1881*, introduction by Daniel Wildenstein, published by La Bibliotheque Des Arts, Lausanne and Paris, in 1974. The Court of Appeals noted that "a catalogue raisonné is a definitive listing and accounting of the works of an artist," and concluded that De Weerth's failure to consult the Monet catalogue raisonné "is particularly inexcusable." 836 F.2d at 112.

De Weerth learned of Baldinger's possession of the Monet through Peter von der Heydt, De Weerth's nephew. In 1981, von der Heydt was told, in a chance conversation with a cousin, that De Weerth owned a Monet that disappeared during the War. Shortly thereafter, he consulted the Monet catalogue raisonné which he found in a museum in Cologne, less than 20 miles from where De Weerth has been living since 1957. The catalogue identified Wildenstein as a prior owner and exhibitor of the painting. In 1982, De Weerth commenced litigation against Wildenstein in the New York state courts to compel Wildenstein to identify the current owner. In that litigation, Wildenstein was directed to identify Baldinger. After Baldinger refused De Weerth's demand for the painting, the present litigation was commenced.

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW

Petitioner seeks review of a decision of the Second Circuit construing and applying the New York statute of limitations to a set of undisputed facts. The case raises no issue of constitutional law; it raises no issue of federal law. De Weerth merely objects to the manner in which a federal court applied state law although it was De Weerth, as plaintiff below, who chose to litigate a state law claim in a federal forum.

Moreover, De Weerth has miscast the issues. Contrary to her assertion, the Second Circuit did not "refuse to certify" the statute of limitations issue to the New York Court of Appeals. Neither petitioner nor respondents requested certification in the appeal to the Second Circuit. Only after De Weerth lost did she even intimate—in her petition for rehearing—that the Second Circuit was not the proper forum to resolve the issue.

In deciding this appeal, the Second Circuit merely assessed what the New York Court of Appeals would rule to be New York law in light of the existing body of law, and having made this assessment, applied it to the facts found by the district court. That is precisely the function of circuit courts sitting in diversity. This Court has often observed that it will rarely substitute its judgment respecting issues of state law for that of the lower federal courts, particularly where, as here, the circuit court is familiar with the law of the state whose law is dispositive.

POINT I

THE CASE TURNS ON THE CONSTRUCTION AND APPLICATION OF A NEW YORK STATUTE OF LIMITATIONS TO THE FACTS OF THIS PARTICULAR CASE

This case turns solely on the construction and application of a three-year New York statute of limitations to the facts of this particular case. In framing the issue on appeal, the Second Circuit stated:

> The [case] presents primarily the issue whether New York law, which governs this dispute, requires an individual claiming ownership of stolen personal property to use due diligence in trying to locate the property in order to postpone the running of the statute of limitations in a suit against a good-faith purchaser.

836 F.2d at 104. The Second Circuit held that New York law requires such due diligence and that, on the facts found by the district court, petitioner failed to exercise due diligence. Accordingly, the New York statute of limitations barred petitioner's action for recovery of an allegedly stolen painting brought almost forty years after petitioner claims it was stolen, and a quarter of a century after respondent had purchased the painting in good faith and for value.

In reaching this conclusion, the Second Circuit reasoned: (1) under New York law, the general rule that the three-year statute of limitations does not begin to run until a demand for the return of the property has been made and refused is subject to the settled exception that the demand which commences the running of the limitations period may not be unreasonably delayed (the "unreasonable delay rule"); (2) although New York courts have applied the unreasonable delay rule to cases in which the identity of the person to whom the demand has been made is known, the applicability of this rule *before* the identity of such person is known is an open question under New York law; and (3) on the basis of existing precedent and the policy considerations underlying the unreasonable delay rule, the New York Court of Appeals would impose a duty of reasonable diligence

in attempting to locate property prior to the time the current possessor is identified. In reaching this last conclusion, the Second Circuit observed:

> This Court's role in exercising its diversity jurisdiction is to sit as another court of the state. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 65 S. Ct. 1464, 1469, 89 L.Ed. 2079 (1945). When presented with an absence of controlling state authority, we must "make an estimate of what the state's highest court would rule to be its law." *Stafford v. International Harvester Co.*, 668 F.2d 142, 148 (2d Cir. 1981) (quoting *Bailey Employment System, Inc. v. Hahn*, 655 F.2d 473, 477 (2d Cir. 1981)). In making that determination, this Court may consider all of the resources that the New York of Appeals could use, *see Francis v. INA Life Insurance Co.*, 809 F.2d 183, 185 (2d Cir. 1987), including New York's stated policies and the law of other jurisdictions.

836 F.2d at 108.

In *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), this Court stated: "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *See, e.g., Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"); *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."). Federal courts, sitting in diversity, are frequently asked to resolve open issues of state law. In such circumstances, it is the province of the federal courts "to sit as another court of the state." That is the essence of diversity jurisdiction. Here, there is nothing "exceptional" about either the law involved—a state statute of limitations—or the manner in which the Second Circuit applied it. *See* discussion *infra* at 13-14.

POINT II

THE SECOND CIRCUIT PROPERLY REVIEWED THE DISTRICT COURT'S DUE DILIGENCE HOLDING *DE NOVO*

The Second Circuit's conclusion that "[w]here, as here, the issue is the application of a legal standard—'reasonable diligence'—to a set of facts, review is *de novo*," 836 F.2d at 110, is a statement of a fundamental proposition of law.

De novo review is the appropriate standard for the application of law to fact determinations. *See Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937) (tax board decision, involving legal conclusions derived from questions of fact, subject to independent legal review). In *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984), this Court held that "[Fed. R. Civ. P.] 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Accord Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 n.15 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 n. 19 (1982) (Rule 52(a) does not apply to issue whether the facts satisfy a statutory standard; such questions are "independently reviewable by an appellate court"); *see also Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980) (clearly erroneous rule does not apply to findings made under an erroneous view of controlling legal principles); *Owen v. Commercial Union Fire Ins. Co.*, 211 F.2d 488, 489 (4th Cir. 1954) (clearly erroneous standard of review does not apply to fact finding if a trial judge has committed an error of law which has manifestly influenced or controlled his findings). More specifically, circuit courts have on numerous occasions reviewed reasonable diligence findings *de novo*.[4]

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4 *See, e.g., Whaley v. Rodriguez*, 840 F.2d 1046, 1050-52 (2d Cir. 1988) (findings concerning reasonableness and due diligence subject to

Anderson v. Bessemer City, 470 U.S. 564 (1985), upon which petitioner heavily relies, is inapposite. That decision held that where an issue is one of "fact," as that term is used in Rule 52(a), a court of appeals should apply a clearly erroneous standard of review, even when the district court's findings "do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 574. In this case, the Second Circuit did not review *de novo* the district court's factual findings regarding the efforts petitioner made to locate the painting; indeed, it accepted these facts as found by the district court. 836 F.2d at 104-06. Rather, the Second Circuit reviewed *de novo* the district court's conclusion about the legal significance of these facts,

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plenary review); *Carter v. Bennett*, 840 F.2d 63, 64-65 (D.C. Cir. 1988) (determination of reasonableness subject to *de novo* review); *Maloley v. R.J. O'Brien & Associates, Inc.*, 819 F.2d 1435, 1440-43 (8th Cir. 1987) (reviewing *de novo* CFTC's decision as to reasonable diligence in discovery of a claim); *United States v. Nates*, 831 F.2d 860, 862 (9th Cir. 1987) (issue of reasonable cause under Fourth Amendment is reviewable *de novo*); *United States v. Simmons*, 786 F.2d 479, 482-83 (2d Cir. 1986) (review of district court application of legal standard of "reasonable delay" is *de novo*); *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Cos.*, 748 F.2d 118, 122 & n.3 (2d Cir. 1984) (issue of plaintiff's diligence in discovering fraud subject to plenary review); *Blitz v. Donovan*, 740 F.2d 1241, 1244 (D.C. Cir. 1984) (district court determination of reasonableness subject to *de novo* review); *Cook v. Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978) (issue of securities purchaser's reasonable diligence "is a sufficiently mixed question of law and fact to permit an appellate court to resolve the issue"); *United States Fidelity & Guar. Co. v. Royal Nat'l Bank of N.Y.*, 545 F.2d 1330, 1332-33 (2d Cir. 1976) (where liability is predicated on good faith, including observance of reasonable business standards and due diligence, courts are not bound to the "clearly erroneous" standard); *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537, 547 (2d Cir. 1962), *quoting Romero v. Garcia & Diaz, Inc.*, 286 F.2d 347, 355 (2d Cir.), *cert denied*, 365 U.S. 869 (1961) ("it has long been the rule in this Circuit that 'a judge's determination of negligence, as distinguished from the evidentiary facts leading to it, is a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the 'unless clearly erroneous' rule"); *Dale v. Rosenfeld*, 229 F.2d 855, 858 (2d Cir. 1956) (court not bound by clearly erroneous standard in reviewing reasonable diligence finding).

and concluded that the efforts of petitioner did not constitute due diligence, as that term was defined and applied in the seminal case of *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), *aff'g* 536 F. Supp. 829 (E.D.N.Y. 1981).

Nothing in *Bessemer City* counsels against *de novo* review of the application of a legal standard to a particular set of facts. Indeed, in a decision rendered subsequent to *Bessemer City*, this Court recognized the distinction between review of factual findings and review of the application of a rule of law to factual findings. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-14 (1986).

POINT III

THE SECOND CIRCUIT WAS NOT OBLIGATED TO CERTIFY THE QUESTION TO THE NEW YORK COURT OF APPEALS

De Weerth also claims that the Second Circuit erred in declining to certify the statute of limitations question to the New York Court of Appeals. In its opinion, the Second Circuit noted that it had, *sua sponte*, considered whether to certify the question and concluded that certification was unnecessary. 836 F.2d at 108 n.5. On appeal, no party had proposed certification. Now that the Second Circuit has ruled against De Weerth, she suddenly insists that the Second Circuit abused its discretion by not certifying the question to the New York Court of Appeals. Contrary to petitioner's assertion, the Second Circuit is the proper forum to resolve such issues, especially in light of the circumstances of this case.

A. Certification Questions Are Committed to the Sound Discretion of Lower Federal Courts

As this Court has acknowledged, the use of the certification procedure "in a given case rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *see also Barnes v. Atlantic & Pac. Life Ins. Co.*, 514 F.2d 704, 705 n.4 (5th Cir. 1975) ("much judgment, restraint and discretion" is used in certifying cases). This Court has fur-

ther held that there is no obligation to certify an issue even "where there is doubt as to local law and where the certification procedure is available." *Id.* at 390. As The Committee on Federal Courts of the New York City Bar Association has cautioned with respect to certification:

> In the past, federal courts have chosen, and wisely we believe, to certify questions in relatively few cases. While the procedure can be useful in a rare case, we believe it would in most cases merely add to the time and expense of resolving disputes and frustrate litigants who are properly before the federal courts.

The Committee on Federal Courts, *Analysis of State Laws Providing for Certification by Federal Courts of Determinative State Issues of Law*, 42 Rec. A.B. City N.Y. 101, 125 (1987).

The Second Circuit properly decided the state law issue itself. First, De Weerth did not request certification until the Second Circuit ruled against her and she submitted a petition for rehearing; second, De Weerth, as plaintiff in this diversity action, chose the federal forum to litigate her state law claim; third, the Second Circuit is familiar with the local law at issue because New York is a state within the territorial boundaries of the Second Circuit; fourth, by the time the Second Circuit decided the appeal, the case had been in litigation for almost five years, and further cost and delay was not justified; and fifth, the issue is not one that will recur with the degree of frequency necessary to justify certification. Courts addressing the question whether to certify an issue to the highest court of a state have considered all of the foregoing factors as relevant to the decision whether to certify.[5]

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5 *See, e.g., Lehman v. Dow Jones & Co.*, 783 F.2d 285 (2d Cir. 1986) (deciding not to certify issue where the court had been advised of certification procedure by a party two months after oral argument and one month prior to date of the opinion); *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 68 (7th Cir. 1981) (denying motion to certify in part because motion was made after trial); *Cartwell v. Univ. of Massachu-*

The Petition discusses only one of the above factors. Petitioner disputes the Second Circuit's observation that the issue is unlikely "to recur with sufficient frequency to warrant use of the certification procedure." The "evidence" De Weerth cites to support her argument (Petition at 18, n.*) is not part of the record below and may or may not be correct. At most, petitioner cites only one pending case where the issue of a plaintiff's unreasonable delay is being litigated. Prior experience has shown that this issue arises extremely infrequently. The exceptional nature of the issue is implicit in the fact that it had not previously been litigated in any reported decision of the New York courts. In addition, this is only the third reported case in the New York courts to raise the issue of unreasonable delay in the pursuit of art objects.[6] Such evidence hardly suggests that the issue occurs so often that the Second Circuit abused its discretion in not referring it to the New York Court of Appeals.[7]

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setts, 551 F.2d 879, 880 (1st Cir. 1977) ("bar should take note that one who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification"); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (certification is particularly appropriate where the federal court is an outsider "lacking the common exposure to local law which comes from sitting in the jurisdiction"); *Marston v. Red River Levee & Drainage Dist.*, 632 F.2d 466, 468 n.3 (5th Cir. 1980) (denying motion to certify in part because case was "long in the tooth"); *Kidney v. Kolmar Laboratories*, 808 F.2d 955, 957 (2d Cir. 1987) (certified issue should be a recurrent one); *see generally* 17A C.A. Wright, A.R. Miller & E.H. Cooper, *Federal Practice & Procedure* § 4248 (1988).

6 The others are *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dep't 1964) and 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. N.Y. County 1966), *modified*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dep't 1967), *modification rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969) and *Elicofon*, 536 F. Supp. 829, *aff'd*, 678 F.2d 1150.

7 The issues which have been certified by courts in the past are ones that clearly occur with much greater frequency. They include how to interpret a standardized provision in a life insurance contract, *see Barnes v. Atlantic & Pac. Life Ins. Co.*, 514 F.2d 704 (5th Cir. 1975), or whether money advanced by an insurer on behalf of its insured to an injured party, prior to settlement or judgment of a tort action, is "payment of any monies" within the meaning of the New York Social Services Law, *see Kidney v. Kolmar Laboratories*, 808 F.2d 955.

B. The Second Circuit Correctly Decided That New York Law Imposes a Duty of Due Diligence on an Owner of Stolen Art

The Second Circuit's decision that New York law imposes a duty of due diligence on a person claiming rights to a valuable painting accords with New York's policy of favoring the good-faith purchaser and of discouraging stale claims; it also accords with the approach taken by other jurisdictions.

As the Second Circuit noted, the substantive elements of a conversion action in New York include demand by the plaintiff and refusal by the defendant. This "demand/refusal" rule is intended to protect a good-faith purchaser by ensuring that before being made liable as a tortfeasor he will be informed of any defect in title. *See Elicofon*, 536 F. Supp. at 848; 836 F.2d at 108-09. The due diligence requirement accords with the purpose behind the "demand/refusal" rule insofar as it protects the good-faith purchaser against the possibility that a plaintiff's demand, and hence the accrual of the statute of limitations, would be indefinitely delayed. Moreover, the due diligence requirement promotes the policies underlying New York's statutes of limitations generally by protecting defendants against stale claims, based on lost evidence, faded memories and unavailable witnesses, and by giving security to property holders. Finally, the due diligence requirement accords with the law in other jurisdictions which "have adopted limitations rules that encourage property owners to search for their missing goods."[8] 836

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8 The "demand/refusal" rule used in New York to determine the accrual of a cause of action in stolen art cases is unusually indulgent to plaintiffs. Most states have adopted more restrictive rules. For example, some states hold that the statute of limitations begins to run in favor of a thief on the date of the theft unless the theft is accompanied by a positive act of concealment done to prevent detection. *See, e.g., Jackson v. American Credit Bureau, Inc.*, 23 Ariz. App. 199, 531 P.2d 932 (1975); *Howk v. Minnick*, 19 Ohio St. 462 (1869); *Adams v. Coon*, 36 Okla. 644, 129 P. 851 (1913). Other jurisdictions follow the rule that the statute of limitations begins to run in favor of an innocent purchaser on the date of his acquisition of stolen property. *See, e.g., Christensen Grain, Inc. v. Garden City Coop. Equity Exch.*, 192

F.2d at 109. The Second Circuit noted that "the fact that plaintiff's interpretation of New York law would exaggerate its inconsistency with the law of other jurisdictions weighs against adopting such a view." *Id.*

In light of (1) New York's policy of favoring the good-faith purchaser and discouraging stale claims and (2) the approach to actions to recover property in other jurisdictions, *id.*, the Second Circuit correctly held that under New York law an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property.

Kan. 785, 391 P.2d 81 (1964); *Luter v. Hutchinson*, 30 Tex. Civ. App. 511, 70 S.W. 1013 (1902). Still other courts have held that the statute of limitations begins to run despite a plaintiff's ignorance of a conversion. *See, e.g., Mastellone v. Argo Oil Corp.*, 46 Del. 102, 82 A.2d 379 (1951). Under any of these more widely accepted rules petitioner's claim would be untimely by several decades.

CONCLUSION

The Petition for a writ of *certiorari* should be denied.

Dated: New York, New York
May 23, 1988

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